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No. 82——

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTION PRESENTED

Does the Fifth Amendment to the United States Constitution require, in the absence of a *Miranda*-type warning, suppression of a probationer's noncustodial but incriminating admissions to his probation officer where the probationer is required by the conditions of his probation to meet with his probation officer as directed and to be truthful with her and the probation officer suspects that the probationer was involved in prior criminal activity?

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IN THE

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No. 82——

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on September 21, 1982.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced and attached hereto as Appendix A, is reported at 324 N.W.2d 340 (Minn. 1982). The opinion of the Hennepin County District Court, reproduced and attached hereto as Appendix B, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on September 21, 1982. This petition for a writ of

certiorari was filed within sixty days of entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1976).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On the morning of September 28, 1981, during the course of a meeting with his probation officer, Marshall Donald Murphy ("respondent") confessed to the 1974 rape and murder of a seventeen-year-old woman. In a pretrial certified appeal of the Hennepin County District Court's order ruling the confession admissible, the Minnesota Supreme Court held, solely on federal constitutional grounds, that the confession could not be used in the State's prosecution of respondent for murder in the first degree (App. A-10).[1] The circumstances leading to respondent's confession are as follows:

---

[1]Following the judgment of the Minnesota Supreme Court of which petitioner seeks review, the Hennepin County District Court dismissed respondent's indictment for lack of probable cause (App. D-3). The judgment of the Minnesota Supreme Court is therefore a final judgment within the meaning of 28 U.S.C. § 1257(3) (1976).

On August 19, 1980, respondent pled guilty to the crime of false imprisonment (Minn. Stat. § 609.255 (1980)) in a prosecution for criminal sexual conduct in the second degree (Minn. Stat. § 609.343 (1980)).[1] Following this plea, the Hennepin County District Court sentenced respondent to a stayed prison term of sixteen months and a probation term of three years (App. C-31). The conditions of respondent's probation required him, *inter alia*, to participate in a treatment program, to report to his probation officer as directed, and to be truthful with her in all matters (App. C-32). The terms of respondent's probation also provided that failure to comply with these conditions "[could] cause [respondent] to be returned to the Court for further hearing or commitment." (App. C-33). On September 22, 1980, the District Court appointed Mara Widseth ("Widseth"), a probation officer with the Hennepin County Department of Court Services, to supervise respondent's probation (App. C-4).

Respondent is a twenty-nine-year-old high school graduate (App. C-25, C-29). He attended vocational school and later served in the military (App. C-29). He is familiar with the criminal justice system (App. C-29). Following his sentencing, respondent participated in a treatment program for sexual offenders and met with his probation officer once a month to discuss treatment, employment, and personal relationships (App. C-5-6).

On July 14, 1981, upon learning that respondent was no longer in treatment, Widseth wrote respondent a letter asking him to contact her immediately (App. C-7). The letter stated that failure to do so would result in an immediate re-

[1]Respondent was originally charged with criminal sexual conduct in the second degree. He pled guilty to false imprisonment, a lesser included offense, pursuant to the terms of a plea agreement.

quest for a warrant (App. C-35). Respondent contacted Widseth by telephone and agreed to meet with her in her office on July 21, 1981 (App. C-8).

At this meeting, respondent indicated that he did not want to continue treatment (App. C-14). Widseth acquiesced and told respondent that she would not seek to have his probation revoked on that ground alone because he was employed and seemed to be doing well in other areas (App. C-14). Respondent and Widseth met again in her office on September 11, 1981, without incident (App. C-8, C-14).

On September 22, 1981, Widseth learned from a counselor in respondent's treatment program that during the course of treatment respondent had admitted the commission of a rape and murder in 1974 and had also indicated that he was not arrested because of the lack of evidence (App. C-15). After discussing the matter with her supervisor, Widseth decided that she would have to relay the information she had received from respondent's counselor to the police (App. C-16). She then wrote respondent a letter asking him to contact her in order to discuss a treatment plan for the remainder of his probation (App. C-15). The letter contained no threats (App. C-36).

Upon receiving Widseth's letter, respondent contacted her by phone and made an appointment to meet with her in her office on September 28, 1981. At no time prior to the September 28 meeting did Widseth contact the police or the prosecutor's office (App. C-20). Throughout the course of this meeting the door to Widseth's office was unlocked and respondent was free to leave at any time (App. C-19-20). He was in fact allowed to leave at the conclusion of the meeting even though he had confessed to a crime (App. C-19).

Widseth began the meeting by telling respondent the substance of the information she had received from his counselor (App. C-16). She then proceeded to stress the need for further treatment in light of the behavioral relationship between the incident leading to respondent's false imprisonment conviction and the rape and murder to which respondent had confessed during treatment (App. C-9). Upon learning that his counselor had disclosed confidential information to his probation officer, respondent became angry (App. C-9) and stated that "he felt like calling a lawyer" (App. C-21, C-26). Widseth told respondent that "he would have to deal with [that] outside the office" (App. C-16). She then reiterated the need to discuss the behavioral relationship between the incidents leading to the false imprisonment conviction and the 1974 rape and murder, stating that such relationship indicated the need for further treatment (App. C-16).

Respondent denied committing the crime of false imprisonment and stated that at the time of the rape and murder he had been using drugs quite heavily (App. C-9). He also stated that he was no longer using drugs (App. C-9). Widseth "confronted" respondent with his claim of innocence of the false imprisonment charge by reviewing with him a police report and a presentence investigation regarding the offense, as well as specific incidents reported by the victim and respondent's own statements concerning the crime (App. C-17-18). Without prodding by Widseth, respondent then proceeded to talk about the rape and murder in detail (App. C-18).

At the conclusion of the meeting, Widseth told respondent that she had a duty to relay the information he had given her to the police and encouraged him to turn himself

in (App. C-18, C-28). Respondent said he understood that Widseth was obligated to go to the police (App. C-22) and asked her for time to think about whether or not to turn himself in (App. C-18). Widseth acquiesced (App. C-18). Respondent began crying and told Widseth that he had committed the "ultimate sin" (App. C-11). He also told Widseth that she "must really care about him" because she gave him time to think instead of turning him in to the police right away (App. C-18-19, C-21). Respondent took a few minutes to compose himself and left the office (App. C-19).

On September 30, 1981, respondent called Widseth and told her that he had consulted an attorney and had been advised not to turn himself in (App. C-28). On October 2, 1981, Widseth procured the issuance of an arrest and detention warrant against respondent from the judge who had sentenced him (App. C-14). On October 29, 1981, the Hennepin County Grand Jury returned an indictment charging respondent with murder in the first degree (Minn. Stat. § 609.185 (2) (1974)).

At a pretrial hearing held before the Hennepin County District Court respondent moved to suppress his confession on the ground that it was obtained in violation of his Fifth and Fourteenth Amendment rights. The trial court ruled that the confession was admissible, finding that respondent was not "in custody" or otherwise deprived of his freedom of action in any significant way at the time of the confession (App. B-11-12), and that his statements were neither "compelled" nor "involuntary" despite the absence of a *Miranda*-type warning (App. B-13-14). On appeal the Minnesota Supreme Court reversed the order of the trial court and remanded the matter for further proceedings, holding as follows:

> Because of the compulsory nature of the meeting, because [respondent] was under court order to respond truthfully to his [probation officer's] questions, and because the [probation officer] had substantial reason to believe that [respondent's] answers were likely to be incriminating we conclude that, as a matter of federal constitutional law, any failure on [respondent's] part to claim the [Fifth Amendment] privilege [against compelled self-incrimination] when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that as a matter of due process, the [probation officer] should have warned [respondent] of his privilege against self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of [respondent's] confession at his trial.

324 N.W.2d at 344 (Minn. 1982) (App. A-10). Following the judgment of the Minnesota Supreme Court the Hennepin County District Court dismissed respondent's indictment, staying the dismissal pending appeal to this Court (App. D-3-4).

REASONS FOR GRANTING THE WRIT

I.

THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND HAS THEREBY EXTENDED THE MEANING OF "CUSTODIAL INTERROGATION" AND "COMPELLED SELF-INCRIMINATION" BEYOND THE SCOPE OF THE FIFTH AMENDMENT.

The question presented herein is whether a probationer suspected of involvement in criminal activity must be advised of his Fifth Amendment privilege against compelled self-incrimination prior to a noncustodial interview with his probation officer. The Minnesota Supreme Court has held that a probationer must be so advised where the conditions of his probation require him to meet with his probation officer as directed and to be truthful with her, and the probation officer has reason to believe that the probationer's answers to her questions are likely to be incriminating. Implicit in the Court's holding is that the probationary relationship, like police custodial interrogation, contains inherently coercive pressures which work to undermine the probationer's will to resist and his ability to make a free and rational choice. The logical corollary of the Court's holding is that, in the absence of a *Miranda*-type warning, all noncustodial admissions by a probationer to his probation officer are barred as inherently compelled even where, as in this case, the probationer is not in custody or otherwise deprived of his "free choice to admit, to deny, or to refuse to answer," *Garner v. United States*, 424 U.S. 648, 657 (1977), and

the totality of the circumstances reflects that the probationer's free will was not overborne, *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

In holding that a probationer must be advised of his Fifth Amendment privilege under the circumstances of this case, the Minnesota Supreme Court has adopted an unduly expansive interpretation of the self-incrimination provision of the Fifth Amendment. The Fifth Amendment does not prohibit a person from incriminating himself. Nor does it prohibit another from persuading him to do so. Moreover, under controlling decisions of this Court, the Fifth Amendment does not require the giving of a warning appropriate to custodial interrogation in a noncustodial setting. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Miranda v. Arizona*, 384 U.S. 436 (1966). Rather, it requires merely that a person not be *compelled* to incriminate himself. Absent some genuine compulsion to testify, therefore, the Fifth Amendment does not automatically proscribe self-incrimination. *See United States v. Washington*, 431 U.S. 181, 186 (1977).

To be sure, the probationary relationship may exert pressures on probationers generally and, for many probationers, may engender an atmosphere conducive to truth telling. Nevertheless, the probationary status does not of itself place a probationer under legal compulsion to incriminate himself. Absent some indicia of involuntariness, therefore, a probationer's noncustodial incriminating admissions are not, as the Minnesota Supreme Court held, automatically proscribed by the Fifth Amendment.

The major thrust of the Minnesota Supreme Court's opinion is that the principle of *Miranda* should be extended to the present case even though respondent was not in "custody or otherwise deprived of his freedom of action in

any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Minnesota Supreme Court appears to have reasoned that the conditions of respondent's probation and the probation officer's belief that respondent's statements were likely to be incriminating, made the probation officer's questions the functional equivalent of custodial interrogation.

In *Miranda*, the Court reasoned that the coercive pressures inherent in custodial surroundings trigger the need for special procedural safeguards to protect the privilege against self-incrimination. In subsequent decisions, this Court has repeatedly emphasized that it is the custodial nature of the surroundings, and not the "focus" of the government's investigation or the strength of the government's suspicions, which gives rise to the need for adherence to the requirements of *Miranda*. *See Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Beckwith v. United States*, 425 U.S. 341, 347 (1976); *Orozco v. Texas*, 394 U.S. 324, 326 (1969); *Mathis v. United States*, 391 U.S. 1, 4 (1968). In *Mathiason* this Court further indicated that "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' " 429 U.S. at 495. Thus, because respondent was neither under arrest nor deprived of his freedom of movement in any way, the Minnesota Supreme Court's ruling constitutes an unwarranted extension of *Miranda*. Moreover, under *Mathiason*, the court's implicit finding that the meeting between respondent and his probation officer took place in a coercive environment is not sufficient to trigger the requirement of a *Miranda*-type warning.

The Minnesota Supreme Court's decision is also in conflict with the general rule that, in the absence of some factor depriving an individual of his "free choice to admit, to deny, or to refuse to answer," the privilege against compelled self incrimination must be timely claimed or it is waived. *See Garner v. United States,* 424 U.S. 648, 657 (1976). This Court has held that where an individual under compulsion to testify makes incriminating disclosures instead of claiming his privilege against self-incrimination, the government is not deemed to have compelled the incriminating disclosures absent a showing that the individual was deprived of his freedom to claim the privilege. *Id.* An individual is deprived of that freedom only when subjected to the pressures inherent in custodial interrogation, *Miranda v. Arizona,* 384 U.S. 436 (1966), or when faced with the choice between self-incrimination and the threat of legal sanctions or job forfeiture, *see Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Garrity v. New Jersey,* 385 U.S. 493 (1967).

The Minnesota Supreme Court now holds, in total disregard of applicable decisions of this Court, that respondent was deprived of his freedom to claim his Fifth Amendment privilege even though he was neither in custody nor required to choose between self-incrimination and the threat of legal sanctions. The Minnesota Supreme Court's decision is premised on the erroneous assumption that probation, like custodial interrogation, contains inherently coercive pressures which deprive a probationer of his freedom to invoke his constitutional right to remain silent and render involuntary an otherwise voluntarly statement.

The Minnesota Supreme Court overlooks the fact that probation is a far cry from the sort of "incommunicado

interrogation . . . in a police-dominated atmosphere" which formed the basis of the Court's holding in *Miranda*. It further overlooks the fact that the conditions of probation do no require probationers to incriminate themselves and therefore do not present them with the inherently coercive choice between self-incrimination and probation revocation. Had respondent invoked his Fifth Amendment privilege instead of making incriminating disclosures, he would have incurred no legal sanctions. *See* Minn. Stat. § 609.14 (1980). Thus, respondent cannot be said to have been denied the free choice to remain silent since a valid and timely claim of the privilege would have been available to him as a complete defense at any subsequent probation revocation hearing. *See Garner v. United States,* 424 U.S. at 665. That respondent thought his probation might be revoked if he invoked his right to remain silent is irrelevant, because a determination of voluntariness or compulsion requires the application of an objective test. *See Oregon v. Mathiason,* 429 U.S. 492 (1977); *United States v. Hall,* 421 F.2d 540 (2d Cir. 1969); *People v. Yukl,* 25 N.Y. 2d 585, 256 N.E.2d 172, 307 N.Y.S. 2d 857 (1969), *cert. denied,* 400 U.S. 851 (1970).

Finally, an assessment of the totality of the circumstances clearly demonstrates that respondent's confession was the product of his free and rational choice. Respondent is a twenty-nine-year-old high school graduate with significant experience in the criminal justice system. The interview during which he confessed was brief and was conducted in familiar surroundings. Respondent was neither threatened nor physically abused. He was made no promises in exchange for his confession and was allowed to leave the probation officer's office at the conclusion of the interview. In

finding respondent's confession involuntary the Minnesota Supreme Court disregarded the traditional criteria of involuntariness and relied instead on factors which do not even approximate the circumstances this Court has recognized in the past as rendering confessions involuntary. *See Brown v. Mississippi*, 297 U.S. 278 (1936) (use of overt physical force); *Spano v. New York*, 360 U.S. 315 (1959) (use of deceptive promises and practices); *Rogers v. Richmond*, 365 U.S. 534 (1961) (threat to have petitioner's wife taken into custody); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (prolonged isolation of fourteen-year-old boy from family and friends); *Lynumn v. State of Illinois*, 372 U.S. 528 (1963) (threat to have petitioner's children taken away from her); *Haynes v. Washington*, 373 U.S. 503 (1963) (suspect refused permission to call wife or lawyer until he confessed; *Mincey v. Arizona*, 437 U.S. 385 (1978) (hospital interrogation while petitioner was barely conscious and weakened by pain and shock).

Whatever the desirable practice may be, the Minnesota Supreme Court's requirement that a probationer be advised of his Fifth Amendment privilege against compelled self-incrimination prior to a noncustodial interview with his probation officer is far removed from the governmental obligation under the Fifth Amendment to guard against compulsion. Moreover, the Court's requirement raises a host of problems not only in the administration of probation as a viable sentencing alternative but also in the administration of justice in general. Carried to its logical conclusion, the decision of the Minnesota Supreme Court requires suppression of all noncustodial admissions to any government agent in the absence of a *Miranda*-type warning and thereby transmutes the policy of the Fifth Amend-

ment against compulsion into a general policy against incriminating admissions.

II.

THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE THE APPARENT CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS.

The exact factual circumstances giving rise to this case have not been duplicated in other reported opinions. Nevertheless, these factual circumstances resemble those confronted by other state and federal appellate courts and may be expected to recur in the future.

The courts which have confronted factual circumstances similar to those presented herein have uniformly held that a probationer's noncustodial statements to his probation officer may be used against him in subsequent criminal proceedings despite the absence of *Miranda* warnings. *See United States v. Miller*, 643 F.2d 713 (10th Cir. 1978) (parolee interviewed by his parole officer at home); *United States v. Holmes*, 594 F.2d 1167 (8th Cir. 1979) (probationer's statements connected him to crime he later committed); *People v. Parker*, 100 Misc.2d 800, 421 N.Y.S.2d 561 (1979) (probationer warned that anything he might say would be used against him in revocation proceeding); *State v. Roberts*, 14 Wash. App. 727, 544 P.2d 754 (1976) (incriminating statements made during telephone conversation initiated by parolee); *People v. Alston*, 79 Misc.2d 586, 360

N.Y.S.2d 768 (1974) (incriminating statements made during regularly scheduled visit); *State v. Johnson*, 87 S.D. 43, 202 N.W.2d 132 (1972) (probationer interviewed by probation officer at home). *People v. W.*, 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S. 2d 260 (1969) (probationer came to probation department voluntarily seeking help for companion). *See also Alspach v. State*, — Ind. App. —, — N.E.2d — (Oct. 6, 1982).

Because of the apparent conflict between the Minnesota Supreme Court's decision and the decisions of other state and federal appellate courts and because of the burgeoning uncertainties that surround the area of probation officer interrogation of noncustodial probationers, it is important for this Court to review the decision of the Minnesota Supreme Court.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully prays that the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court be granted.

Respectfully submitted,

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November 1982.

APPENDIX

Appendix A

STATE OF MINNESOTA,

Plaintiff,

vs.

MARSHALL DONALD MURPHY.

Defendant.

Scott, J.
Dissenting:
Peterson,
Yetka, JJ.

Endorsed
Filed August 31, 1982
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Where probation agent interrogating defendant probationer had substantial reason to believe that answers to her questions would incriminate defendant and where defendant as a condition of probation was required to meet with her and to respond to her questions truthfully, agent should, as a matter of due process, have warned defendant of his privilege against compelled self-incrimination before questioning him and agent's failure to do so bars use of resulting confession against defendant at trial.

Reversed and remanded for further proceedings.

Heard, considered and decided by the court en banc.

OPINION

SCOTT, Justice.

Pursuant to Minn. R. Crim. P. 29.02, subd. 3 (1980). the district court has certified to this court as important and doubtful the question of the admissibility of a confession made by defendant, who is being prosecuted on a charge of first-degree murder, to his probation agent. The issues raised by the appeal relate to whether the confession was obtained in violation of defendant's privilege against compelled self-incrimination, which is contained in U.S. Const. amend. V.

In 1974 defendant was twice questioned by Minneapolis Police in connection with the murder of a 17-year-old Minneapolis girl but no charges were filed against him.

In 1980 defendant pleaded guilty to a reduced charge of false imprisonment in a prosecution for criminal sexual conduct in the second degree in connection with a different incident. The trial court sentenced defendant to a stayed prison term of 16 months, with 3 years probation. As conditions of probation, defendant was ordered to participate in a treatment program and to report to his probation agent as directed by her. He was also ordered to be truthful with her in all matters.

Thereafter, defendant met with the agent at her office approximately once a month.

In July 1981 the agent received information that defendant was no longer participating in the treatment program. The agent wrote defendant a letter telling him to contact her and set up a meeting. The letter added that "Failure to do so will result in an immediate request for a warrant." That meeting was held in late July, with the

agent telling defendant at the end that notwithstanding his lack of participation in the program, she was not going to seek revocation of his probation because he was employed and was doing well in other areas.

Defendant next met with the agent on September 11, 1981, without incident. He was next scheduled to arrange a meeting with the agent in mid-October.

On September 22, the agent learned from a counselor at the treatment program that during treatment defendant had said that he had once committed a rape/murder and that the police did not arrest him because of the lack of evidence.

Two days later the agent met with her supervisor and they decided that she had to report this information to the police. She told her supervisor that she would tell defendant of their decision. That same day she wrote defendant a letter stating, in full, "To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment." The agent did not contact police before meeting with defendant but knew in advance that she would tell the police about any incriminating statements defendant made.

The meeting was held on the morning of September 28 in the agent's office. The agent apparently opened the meeting by telling defendant about the information which she had received from the counselor and then said that she now felt that defendant needed treatment. Defendant became angry when he learned this. He stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney.

The agent apparently replied that he would have to deal

with that outside the office; that her main concern was to talk to him about the relationship of the prior crime and the one of which he was convicted and about his need for treatment under the circumstances.

The agent testified that her door was unlocked and that defendant was perfectly free to leave at any time without talking with her. Defendant testified that he did not feel free to leave because that would have been a violation of his probation. He also testified that he did not know he had a right to refuse to answer her questions or to consult an attorney, and that, because she put the entire conversation in the context of what the treatment plan for him should be, it did not occur to him that she would go to the police with what he said. He testified further that he had had two probation officers before her and that neither of them had ever gone to the police with anything he said.

The session therefore continued, with the agent first talking with defendant about the crime of which he was convicted, then about the rape/murder. When defendant claimed that he really was not guilty of the crime of which he was convicted, the agent confronted him with the police reports and so on and challenged his claim of innocence. When she talked with him about the rape/murder, he confessed.

After defendant had made his confession, the agent informed him for the first time that she would have to tell the police what he had said. She also urged defendant to turn himself in.

On September 30, after talking with an attorney, defendant told the agent that he had been advised not to turn himself in to the police. On October 2, a warrant was issued for defendant's arrest. He was subsequently in-

dicted for first-degree murder with testimony given by the agent. The district court denied a motion to suppress.

The issue before us is whether the confession to the agent was obtained in violation of any of defendant's rights. We hold that it was.

The United States Constitution, Amendment V, protects one against being "compelled in any criminal case to be a witness against himself."

Generally, the government may not use a person's incriminating statements in any subsequent criminal case in which he is a defendant if the statements were legally compelled by the government notwithstanding his claim of the privilege against compelled self-incrimination. *Garner v. United States*, 424 U.S. 648, 653 (1976).

Although the privilege is not self-executing but generally must be claimed, the United States Supreme Court has isolated certain situations in which the failure to claim the privilege at the time of the compulsion will not bar the defendant's later reliance on it at trial.

One such situation is custodial interrogation of a suspect. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that not even a voluntary confession obtained during custodial interrogation of a suspect by police could be used against him in a later criminal prosecution unless the prosecution showed that the suspect was given a *Miranda* warning and knowingly and intelligently waived the privilege. The reason for the exception in such cases was stated in *Garner v. United States*, 424 U.S. 648, 657 (1976), as follows:

> It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent.

> [Citation omitted]. At the same time, the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures. Because of the danger that custodial interrogation posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege.

In another line of cases the Court held that persons required to file returns in connection with the federal occupational and excise taxes on gambling could exercise the privilege simply by failing to file such a return and did not have to submit a claim of privilege in lieu of the return in order to claim the privilege because such a submission by itself would have been incriminating. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968). As stated in *Garner*, "The basis for the holdings in *Marchetti* and *Grosso* was that the occupational and excise taxes on gambling required disclosures only of gamblers, the great majority of whom were likely to incriminate themselves by responding" and therefore, as in the case of custodial interrogation of suspects, "Any compulsion to disclose was likely to compel self-incrimination." 424 U.S. at 660.

A third situation in which the Court has held that the defendant can rely on the privilege at trial notwithstanding his failure to claim it at the time he made his incriminating statements is exemplified by *Garrity v. New Jersey*,

385 U.S. 493 (1967). In that case policemen who were being investigated for corruption were told that they could claim the privilege but that they would be discharged if they did. The Court held that their incriminating disclosures could not later be used against them notwithstanding their failure to claim the privilege when they were being investigated because the penalty of discharge for the concededly valid exercise of the privilege foreclosed a free choice to remain silent.

Finally, in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that it was error to allow a phychiatrist to testify at the penalty phase of a capital felony trial on the issue of future dangerousness because the psychiatrist's opinion was based on incriminating statements that defendant had made during a court-ordered psychiatric examination to determine defendant's competency for trial, at which defendant had not been given a *Miranda* warning. Although the psychiatrist was not a policeman, he was not acting solely in defendant's interests when he examined defendant and the examination was in fact a phase of the adversary system. Since the defendant did not intiate the evaluation or attempt to use the psychiatric evidence, the defendant should not have been compelled to submit to the examination without a warning to him that his statements could be used against him.

A majority of courts in other jurisdictions which have considered the admissibility of confessions made by a released offender to a probation or parole officer while in custody and absent *Miranda* warnings have held such confessions admissible in parole or probation revocation her-

ings, but inadmissible in a criminal prosecution.[1] This rule was more succinctly stated by the United States District Court for the Western District of Pennsylvania as follows.

> [W]hile statements made to a probation or parole officer without the *Miranda* warnings being given are properly admitted in a parole revocation hearing where various types of hearsay may be used to inform the court as to the parole violation, nevertheless when these statements are used to prove an entirely separate offense against the defendant *and he is in custody and under the compulsion of discussing matters with his parole or probation officer*, *Miranda* warnings must be given before such testimony can be admitted in evidence in the trial involving the separate offense.

United States v. Steele, 419 F. Supp. 1385, 1386-87 (W.D. Pa. 1976). A rationale underlying the suppression of statements given a parole officer without *Miranda* warnings is that released offenders are under heavy psychological pressure to answer inquiries made by their supervising officers. This pressure is recognized as sufficient to render the interrogation inherently coercive.[2]

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[1] *See People v. Diesing*, 67 Ill. App. 3d 109, 23 Ill. Dec. 781, 384 N.E. 2d 575, 577 (1978); *State ex rel. Struzik v. Dept. of Health & Soc. Serv.* 77 Wis. 2d 216, 252 N.W.2d 660, 662 (1977); *People v. Hardenbrook*, 68 Mich. App. 640, 243 N.W.2d 705, 708 (1976); *State v. Magby*, 113 Ariz. 345, 554 P.2d 1272, 1276 (1976); *State v. Roberts*, 14 Wash. App. 727, 544 P.2d 754, 756-57 (1976); *United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972); *State v. Williams*, 486 S.W.2d 468, 473 (Mo. 1972); *State v. Lekas*, 201 Kan. 579, 442 P.2d 11, 15 (1968). *See also United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980).

[2] *See, e.g., State v. Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396, 400 (1974), *cert. granted*, 420 U.S. 1003, *remanded*, 425 U.S. 257, *on remand*, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976).

These cases, *inter alia*, illustrate the exceptions to the rule that a person ordinarily must claim the privilege at the time he is being compelled to incriminate himself if he later wants to be able to prevent the use of the incriminating statements in any criminal prosecution of him. Justice Powell summarized the rule recently in *Roberts v. United States*, 445 U.S. 552, 559 (1980), stating that "[a]t least when the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." He then summarized *Garner* by saying, in a footnote, that the rule is subject to exception "when some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent " 445 U.S. at 560, n.6.

We need not decide whether defendant in fact claimed the privilege in this case because we conclude that an exception must be made on the facts of this case to the general rule requiring a timely claim of the privilege.

Although defendant was not in custody in the usual sense, his freedom of action was considerably restricted at the time of the questioning. In *Estelle v. Smith*, 451 U.S. 454 (1981), the psychiatric examination occurred in jail so that the questioning was custodial in the usual sense. However, some of the language used by Chief Justice Burger in the Court's opinion suggests that the result might have been the same even if the examination had not been conducted while the defendant was in jail because defendant was under legal compulsion, in the form of a court order, to submit to the examination.

In this case the examination occurred in the agent's office. Defendant was there at her request but, unlike the

defendant in *Oregon v. Mathiason*, 429 U.S. 492 (1977), who voluntarily went to the station to talk with the police at their request. defendant was there under legal compulsion since it had been made clear to him in the past that it was a condition of his probation that he meet with the agent when requested. It was also a condition of defendant's probation that he respond truthfully to the agent's questions. Failure to meet with her or to be truthful with her could have constituted a violation of the terms of probation.

Also, the questioning was not just general questioning but questioning by a government agent who had "substantial reason to believe that the requested disclosures [were] likely to be incriminating," *Roberts v. United States*, 445 U.S. 552, 559 (1980), a fact bearing strongly on whether defendant's failure at that time to claim the privilege bars his reliance on the privilege as a ground for suppression at trial.

Because of the compulsory nature of the meeting, because defendant was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that defendant's answers were likely to be incriminating, we conclude that. as a matter of federal constitutional law, any failure on defendant's part to claim the privilege when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that, as a matter of due process, the agent should have warned defendant of his privilege against compelled self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of defendant's confession at this trial

When the enormity of this decision is contemplated, we wonder whether there may be some other solution than the exclusion of otherwise trustworthy evidence. John Henry Wigmore Professor of Law Emeritus Fred E. Inbau, in his article *Over-Reaction—The Mischief of Miranda v. Arizona*, 73 J. Crim. L. & C. 797 (1982), writes that:

> There is no better refutation of *Miranda* philosophy than the opinion of Chief Justice Joseph Weintraub of the New Jersey Supreme Court in a 1968 case, in which he stated:
>
> "There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. Voluntary confessions accord with high moral values, and as to the culprit who reveals his guilty unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left. Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be 'compelled' to give evidence against himself"

Id. at 809. At this writing, however, we believe that *Weeks v. United States*, 232 U.S. 383 (1914), and its

progeny constitutionally demand the result arrived at in this opinion

Reserved and remanded for further proceedings.

PETERSON, Justice (dissenting).

The essence of the majority decision is that the interrogation of the defendant/probationer by his probation officer, who failed to inform him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), violated due process and mandates suppression of the resulting confession. The most recent case to consider this issue supports a contrary conclusion. In *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982), a probation officer received information concerning possible violations of probation by a probationer. The officer went to the probationer's home and questioned the probationer about the alleged violations. The probationer, after unsuccessfully requesting an attorney, gave incriminating responses. The probationer later sought to suppress these responses, contending that the interrogation was custodial and thus the admission of the statements violated *Miranda*. The court characterized this contention as "without merit" and stated:

> The duty "to report" and to answer questions posed by a probation officer is an integral obligation of the probationary status. While a probationer is not deprived completely of his Fifth Amendment rights and may assert them, he runs the risk that his refusal to answer will lead to a charge of violation of probation. Any other rule would make a mockery of the supervision aspect of probation.

Id. at 390. While *Rea* is not foursquare with the facts in this case, I see little difference between imprisoning a

defendant for violation of parole and imprisoning him for a new crime, based in either case on evidence obtained from his probation officer. There was no more coercion of defendant Murphy in this case than there was of the defendant in *Reo*, and hence, I cannot see that defendant Murphy was "compelled" to give evidence against himself. In this regard, I concur with the views of Chief Justice Weintraub contained in the last paragraph of the majority opinion.

YETKA, Justice (dissenting).

I respectfully dissent. I do not believe the privilege against self-incrimination was intended to apply to the situation presented here. The defendant is a parolee who would be serving a prison sentence but for that fact. One of the conditions of his parole is to meet periodically with a probation agent. The probation officer's function is to work towards rehabilitating the parolee while protecting the public interest. *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980). To do this job, the agent must be aware of all of the parolee's problems, both past and present. It is entirely reasonable for the agent to ask a parolee if he has had prior problems with the law. If the agent in this case had gone first to the police before talking with the defendant, she would have destroyed her credibility and severely impaired her ability to assist the defendant.

We have held in *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980), that a parolee has a duty to cooperate with his agent and that an agent can search a parolee's apartment without a search warrant if the agent has probable cause to believe the parolee has violated the terms of parole. As we noted there, because of the special rela-

tionship between a probation officer and his client, the law relating to probationary searches cannot be strictly governed by automatic reference to ordinary search and seizure rules. *Id.* at 368; *see Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975) (parole rather than probation situation). Thus, I would hold this is not an ordinary custodial situation to which the privilege should apply. Even if it is held to be custodial, I would hold that this parolee's situation is an exception to the rule and that the privilege does not apply.

STATE OF MINNESOTA, SUPREME COURT

STATE OF MINNESOTA,

82-271 vs.

MARSHALL DONALD MURPHY,

Defendant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the issue before this court as to whether the confession to the agent was obtained in violation of any of the defendant's rights is answered in the affirmative and the matter is remanded to the district court for further proceedings in accordance with the opinion, a certified copy of which is attached hereto.

Dated and Signed September 21, 1982.

BY THE COURT.

Attest:
JOHN McCARTHY, Clerk.

STATE OF MINNESOTA
SS.
SUPREME COURT

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul September 21, 1982.

JOHN McCARTHY, Clerk.
By /s/ Wayne Tschimperle, Deputy.

Appendix B

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

STATE OF MINNESOTA,

Plaintiff,

vs.

MARSHALL DONALD MURPHY,

Defendant.

OMNIBUS II & MEMORANDUM

D.C. No. 79037
C.A. No. 81-2515

The above-entitled matter came duly on before the Honorable Jonathan Lebedoff, one of the Judges of the above-named Court, upon defendant's motions to suppress the testimony of his probation officer, Mara Widseth, and personnel from Alpha House regarding any of defendant's statements; to dismiss the grand jury indictment; to suppress evidence seized from defendant; to suppress any evidence taken as a result of identification procedures; and upon the State's motion in limine to acquire testimony from the Alpha House employees.

The State appeared by Robb Lynn, Esq., Assistant Hennepin County Attorney, and the defendant appeared by Mark Wernick. Esq.

Upon all the files, records, testimony at the Omnibus hearing and memoranda of counsel,

IT IS ORDERED THAT:

1. Defendant's motion to exclude the testimony of his probation officer is denied.

2. Defendant's motion to dismiss the grand jury indictment is denied.

3. Defendant's motion to suppress evidence seized from defendant as a result of identification procedures is denied.

4. The State's motion to require testimony from Alpha House employees is denied.

Let the attached memorandum be made a part of this order.

DATED: February 9, 1982.

BY THE COURT:

/s/ Jonathan Lebedoff
Judge of District Court

MEMORANDUM

This prosecution is by indictment for Murder in the First Degree of Sherrie Cole on or about October 29, 1974. Defendant was questioned by police on at least two occasions soon after the body of Sherrie Cole was found on November 21, 1974, but no charges were brought, apparently because the evidence was insufficient.

On August 19, 1980, defendant pled guilty before Judge Durda to the charge of False Imprisonment in Hennepin County District Court File No. 75330. He was sentenced on September 22, 1980, to serve sixteen months at Stillwater, execution stayed three years, with three

years probation. Mara Widseth, of the Hennepin County Department of Court Services, was appointed to supervise this probation.

Among the conditions of probation were the normal ones, including the requirement to be truthful to the probation officer and to report to the probation officer as directed. Additionally, defendant was required to pursue treatment at Alpha House, a treatment program designed to deal with sexual offenders containing both in-patient and out-patient components.

Shortly after being placed on probation, the defendant began treatment at Alpha House. On or about July 3, 1981, the probation officer received information from Alpha House to the effect that the defendant was not pursuing treatment. On July 14, 1981, the probation officer wrote the defendant a letter requesting that he contact her. The letter stated, "Failure to do so will result in an immediate request for a warrant" (Def. Ex. 3). In response to that letter, the defendant scheduled a meeting with the probation officer at her office. The meeting occurred on July 21, 1981. At that meeting, the probation officer told the defendant that she would not seek to revoke his probation for leaving treatment because he was apparently doing well in other areas. However, the probation officer still retained the authority to have the defendant pursue treatment. On October 2, 1981, the sentencing Court, at the request of the probation officer, issued an Arrest and Detention Warrant against the defendant which alleged that "although the defendant pursued treatment at Alpha House, he was terminated for failure to actively work on a problem area and to comply with the terms of the group" (Testimony of Mara Widseth).

On September 11, 1981, the defendant met again with his probation officer at her office. This meeting was one of several monthly meetings which the defendant arranged by calling the probation officer for an appointment. After this meeting, the defendant was under no obligation to arrange another meeting with his probation officer until mid-October, 1981.

On September 22, 1981, the probation officer was told by a counselor at Alpha House that during treatment the defendant said that he had committed a rape/murder and that the police did not arrest him because of a lack of evidence.

On September 24, 1981, the probation officer met with her supervisor in order to discuss what should be done with the new information. They decided that the probation officer must report the information to the police. The probation officer told her supervisor that she would inform the defendant of their decision. On that same day, the probation officer wrote the defendant a letter which said, "To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment." (Def. Ex. 4.)

At 10 a.m. on September 28, 1981, in response to the probation officer's letter, the defendant met with her at her office. At the time of the meeting, the defendant had not slept for 24 hours, having worked from 10 p.m. to 6 a.m. the previous evening. During this meeting, the probation officer "confronted" the defendant with the information she had received from Alpha House. She also told the defendant that although she had previously allowed him to continue on probation without treatment, she now felt strongly that he needed further treatment. The defen-

dant became angry because he thought that everything he said in treatment was confidential.

Both the probation officer and defendant testified that he spoke of obtaining an attorney. Her understanding was that the defendant was interested in an attorney for a civil action against Alpha House for the breach of confidentiality; he maintains he was interested in protecting his rights relative to criminal prosecution. In any case, she told him he would have to contact an attorney outside her office and then proceeded with the interview.

The thrust of defendant's statement was that the false imprisonment and rape/murder were unrelated. He maintained that he was innocent of the false imprisonment charge and explained that the rape/murder occurred at a time when he had just returned from the army, had broken up with his girlfriend, and was using drugs heavily. He gave the details of the rape/murder.

After the defendant had talked about the murder, the probation officer told him that she was obligated to take her information to the police. By this time, the defendant had started to cry. The probation officer encouraged the defendant to turn himself in to the police. The defendant asked for time to think about it, and the probation officer gave him "permission" to do so. He then left her office.

That evening, the defendant made several attempts to contact a lawyer. On September 30, 1981, after having talked with a lawyer, the defendant called his probation officer and told her that he was advised not to turn himself in to the police. The record is not clear as to whether or not the probation officer had already contacted the police. In any event, on October 2, 1981, a warrant for Murder

in the Second Degree was issued against the defendant, and he was subsequently indicted for Murder in the First Degree

Defendant asserts three independent but interrelated grounds for excluding testimony regarding his confession to the probation officer. First, he argues that the setting was custodial and that therefore the *Miranda* warnings were a prerequisite for admissibility. Alternatively he argues that even if the full *Miranda* warnings were not required he should at least have been informed that his statements could be used against him in a criminal trial and that he had the right to speak to a lawyer. Finally, he asserts that the statements were compelled within the meaning of the Fifth Amendment and consequently inadmissible regardless of any requirements for warnings. Defendant does not directly claim that his Sixth Amendment right to counsel was denied, but rather that his request for counsel was an invocation of the privilege against self-incrimination

In the opinion of this Court, the setting of the interview was not custodial and the *Miranda* warnings were not required. While undoubtedly it would have been the better practice to have given some kind of warning, we do not feel such a warning was an absolute prerequisite to finding the statement to be voluntary. We believe that the totality of the surrounding circumstances indicate (sic) that this statement was in fact voluntarily given and consequently, testimony concerning it is admissible.

I. MIRANDA

Miranda v. State of Arizona, 384 U.S. 436 (1966), establishes a presumption that statements resulting from

an in-custody interrogation by law enforcement agents are involuntary unless preceded by very specific procedural safeguards. As subsequent cases make clear, custody is an essential element to trigger those procedural safeguards. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711. 50 L.Ed 2d 714 (1977), *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed 2d 1 (1976). Citing the above two cases, the Minnesota Supreme Court has stated:

> "The test for determing the need for a *Miranda* warning is not whether the interrogation has coercive aspects to it or whether the investigation has focused on the person being questioned, but whether the person being questioned is in custody or is deprived of his freedom of action in any significant way."

State v. Palm, 299 N.W.2d 740 (1980).

Defendant argues that he was here deprived of his freedom of action in a significant way, citing the facts that he was under an obligation to meet with his probation officer, that he was obliged to tell her the truth and cooperate, and that she already had grounds to revoke his probation (his failure to continue the treatment). His failure to cooperate would have constituted additional grounds to revoke his probation.

In support of his position that these elements deprived him of his freedom of action in a significant way, defendant cites the Court to *State v. Fields*, 621 P. 2d 651 (Ore. App. 1980), where a probationer was required to come to his probation officer's office to fill out his monthly report which he was late in filling out and which would have been grounds for revocation. While the report was being filled out the probation officer, knowing the proba-

tioner was suspected of being involved in a car theft, called a policemen who came to question the probationer. Prior to beginning the questioning, the police officer told the probationer that he was not under arrest and that he didn't have to answer any questions. He none-the-less confessed. The Court held that for the purposes of *Miranda*, he was in custody and the lack of the warnings made the confession involuntary. In coming to this conclusion, the Court analyzed the factors in the probation officer/probationer relationship that defendant urges us to rely on here. On rehearing, the Court distinguished this case from *Mathiason v. Oregon*, supra. where a burglary suspect responded to a state trooper's message to call him, then arranged to meet him at the trooper's office and there gave a confession, on the basis that *Mathiason* went voluntarily where *Fields* was required to come to the probation officer's office or face the potential consequence of having his probation revoked. *State v. Fields*, 624 P.2d 655 (Ore. App. 1981).

Admittedly, *Fields* presents many similarities to the fact situation involved in this case. A significant distinction, as defendant recognizes, is that in *Fields* the interrogator was in fact a policeman. He points out, however, that the focus of the Court was on the relationship with the probation officer and not that with the police officer.

It is apparent, however, from cases cited to the Court by the State, that courts do not universally arrive at the same conclusion the Oregon appellate court did. In *United States v. Holmes*, 594 F. 2d 1167 (8th Cir. 1979), a conversation with a probation officer regarding black powder weapons which occurred when the defendant was not in custody or charged with a crime was considered admis-

sible without *Miranda* warnings in his subsequent trial for allegedly receiving firearms because he was neither in custody nor charged at the time of the conversation. *United States v. Miller*, 643 F. 2d 715 (1981) rejected the notion that the parole officer-parolee relationship was such that the parolee was in a custodial interrogation situation when interviewed in his home. *People v. Petit*, 97 Ill. App. 693, 423 N.E. 2d 513 (1981) similarly found statements to a probation officer at an informal meeting (where it took place is not clear) admissible to show that he was a sexually dangerous person. *In re Ricahrd T.*, 79 Cal. App. 3d 382, 144 Cal. Rptr. 856 (1978), a minor actively on parole to the Youth Authority was picked up by his parole officer and taken to the parole officer's office after the parole officer had gone to the minor's home and found a gun on the couch. While driving to the office and once there the parole officer questioned the minor regarding his involvement with the gun and several specific incidents. The gun was determined to have been stolen and the minor was charged with receiving stolen property. One distinguishing feature is that the Court felt, somewhat contrary to the evidence, that at the time of the initial investigation the parole officer was only investigating a parole violation and not a new crime. However, in *People v. Alston*, 79 Misc. 2d 586, 360 N.Y.S. 2d 768 (1974), the probation officer did know of a pending homicide investigation and questioned defendant when receiving Methadone. His statements were admissible.

People v. Parker, 100 Misc. 2d 800, 421 N.Y.S. 2d 561 (1979), also presented facts similar to the instant case. Defendant notified his parole officer he had been arrested. These charges were subsequently dismissed. On the

day defendant told his parole officer of the dismissal, the officer asked defendant to come see him. During the interview defendant made a highly incriminating statement. The parole officer notified police; testified before the grand jury; and defendant was subsequently reindicted. The issue before the Court was whether admissions made to a parole officer can be introduced into evidence where no *Miranda* warning was given. The Court answered in the affirmative, stating:

> "Miranda established the classic definition of custodial interrogation as 'questioning initiated by a law enforcement official after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'
>
> "The defense has argued that this visit to the parole officer was in fact a custodial setting in that the defendant was under heavy 'psychological' pressure to respond to questions put to him by his parole officer as that officer has the power to detain and arrest a parolee.
>
> "This court cannot agree with defendant's contention; the test laid down in *People v. Yukl*, 25 N.Y. 2d 585, 307 N.Y.S. 2d 857, 256 N.E. 2d 172 for determining whether a defendant is in custody 'is not what the defendant thought, but rather what a reasonable man, innocent of any crime would have thought had he been in defendant's position.'
>
> "In this particular case we have a fact pattern whereby a parolee initiated routine contact with a parole officer following an arrest and prior to a sub-

> sequent court appearance, and this parolee was advised at that time 'to come in and see' his parole officer following the next court appearance. This does not convey the element of 'the incommunicado police dominated atmosphere of custodial interrogation and overbearing of the subject's will' necessary for determining custodial interrogation established by *People v. W.*, supra; but rather the freedom to come and go after each visit to the parole officer would characterize the questioning as routine and an integral part of the parole process. These monthly visits took place from April, 1978 until at least November, 1978, and after each visit the defendant was free to leave."

These cases provide ample support for our conclusion that defendant should not be deemed in custody here. They recognize that there is indeed an element of compulsion in the probation officer/probationer relationship, that the probationer's appearance at a probation office is not entirely voluntary and that there are consequences which could follow from being dishonest with the probation officer.

Here defendant was required to meet with his probation officer in her office. He, however, was responsible for setting up the time. The office was a place where he had been at least twelve times during the previous year. He came in on his own; he left on his own. While we do not ascribe any particular significance to it, we note that the door to the office was open at all times during the interview. We cannot turn this into the custodial setting the procedural safeguards of *Miranda* was (sic) aimed at. In each of the four interviews there the defendant was subject

to several hours of police interrogation in police interrogation rooms following arrest. *Mathiason*, supra, makes clear the limits of what is to be considered custodial. We do not think the distinction the Oregon Court makes in *Fields* is sufficient to turn this into a custodial setting or one which significantly deprives the defendant of his freedom.

The issue of voluntariness apart from *Miranda* warnings raises many of the factors already discussed but does present a closer question.

An inculpatory statement is only admissible if it was voluntarily given. *See, State v. Biron*, 266 Minn. 272, 123 N.W. 2d 392 (1963). When a claim of involuntariness is made, the court must look at the totality of the circumstances to determine whether "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." *Beckwith v. United States*, 425 U.S. 341, 348 (1976), citing *Rogers v. Richmond*, 365 U.S 534, 544 (1961). The totality of relevant circumstances include age, maturity, intelligence, education, experience, and the ability to comprehend. *See, State v. Hogan*, 297 Minn. 430, 212 N.W. 2d 664 (1973). A confession may not be extracted by any sort of threat or violence or obtained by direct or implied promises. *Malloy v. Hogan*, 378 U.S. 1 (1964). The court must review the facts surrounding the confession, determine how defendant reacted to these external facts, and decide the legal significance of how defendant reacted. *See, State v. Orscanin*, 283 N.W. 2d 897, 899 (Minn. 1979), *cert. denied* 100 S.Ct. 464 [(1979)].

Phrased as defendant puts it, the issue is whether or not he was compelled to make the statement. In *United States v. Washington*, 431 U.S. 181 (1977) the court said:

> "*Garner* holds that the Self-Incrimination Clause is violated only when the Government compels disclosures which it knows will incriminate the declarant. That is, only when it intentionally places the individual under 'the compulsion to incriminate, not merely compulsion to make unprivileged disclosures." '

In *Washington*, grand jury testimony was found admissible in spite of a failure to warn that the information could be used to indict the witness.

Here there is no question that the probation officer knew that the information she was requesting would be incriminating, and further that she was intending to turn the information over to the police. We have no problems assuming that she was a government agent. The question remains, however, whether or not the statement was "compelled" or, alternatively voluntary (sic). We think not.

As we have already noted, defendant was responsible for setting the time of the appointment. He chose to make it at a time when he apparently had not slept for twenty-four hours. Very likely he was tired, but that tiredness was of his own doing. He could have set up a time when he would have been rested. Again, he was meeting in a place familiar to him and with a person whom he had met a number of times. He was 29 years old, a high school graduate, and has made no claim of any mental deficiences. He had been previously convicted of other felonies and was familiar with the criminal justice system. When confronted by the probation officer, he was angry at his confidences being disclosed but talked with her freely. He now claims that he asserted a right to talk to an attorney, and whatever his real intent may have been, we

are persuaded by the probation officer's testimony that he did not express that desire in any context other than a civil suit for the breach of confidentiality. Against these factors is the fact that a condition of his probation was that he be honest with his probation officer, and that he was there ostensibly to discuss further treatment in regard to his current probation. Failure to follow through with either of these could have resulted in revocation of the probation and potential imprisonment. These factors were present in all of the cases previously discussed concerning statements to probation or parole officers and in all but one case the courts found the confessions admissible. Considering this and all of the other surrounding circumstances we believe this confession to have been voluntary.

In *Orscanin*, supra, the Minnesota Supreme Court found statements made after six days in a six-by-nine or ten feet lockup to have been voluntary. The defendant was eighteen years old, facing his first contact with adult court and had been led by his probation officer to believe the matter would be handled in juvenile court if "he cleared things up." Even with the full *Miranda* warnings the factors there appear to us to be much more compelling than those here.

As we noted earlier, defendant's argument that he was entitled to some kind of warning regarding the use of his confession represents what we would consider to be the better practice, but the lack of such warnings do (sic) not violate the voluntariness of the confession given here.

MOTION TO DISMISS INDICTMENT

Defendant's motion to dismiss the grand jury indictment is based on the premise that the testimony of Mara

Widseth is inadmissible. Having determined that it is admissible, it appears to the Court that the evidence admissible at trial is sufficient to establish probable cause to believe that Murder in the First Degree was committed. The motion to dismiss is accordingly denied.

STATE'S MOTION IN LIMINE

The State and defendant have stipulated that the provisions of 42 CFR Chapter 1 are applicable to the Alpha House programs The regulations have been promulgated pursuant to 21 U.S.C. §1175 and 42 U.S.C. §4582 providing for confidentiality of patient records in federally assisted drug and alcohol rehabilitation programs. We do not believe a treatment program under these regulations can be segmented, as the State would have us do, into drug and alcohol components, to which the regulations apply, and sexual therapy, to which they don't 42 CFR §2.61-2.67 make (sic) provisions for court ordered disclosures and in §2.65 specifically deals with investigation and prosecution of patients. The State argues that this should not be governed by §2.63 which limits disclosures under the sub part to objective data such as the facts or dates of enrollment. We find no support for this reading, particularly in light of §2.63-1, which we quote in full:

> "In the three-year period subsequent to the original enactment of 21 U.S.C. 1175, not a single occasion was reported to the Special Action Office for Drug Abuse Prevention on which an attempt was made to secure a (b) (2) (C) order authorizing the disclosure of a confidential communication by a patient to a counsellor or other member of the staff of a treat-

> ment program. In all of the comments and testimony received on the draft regulations published August 22, 1974, there was nothing to suggest any circumstances under which a court order authorizing such a disclosure would be either desirable or appropriate. Yet the mere possibility that such an order might be issued is to some a source of anxiety which impairs the effectiveness of treatment. Such an ongoing negative effect clearly outweighs the remote theoretical possibility that some perculiar circumstance might arise in which judicial authorization for such a disclosure might be sought. Accordingly, the limitation imposed by §2.63 on the scope of (b)(2)(C) orders to preclude that possibility, and hence to eliminate its adverse influence on treatment services, appears to be a proper exercise of rulemaking power."

Even were we not persuaded that this section precludes the testimony the State seeks, we would disallow it nonetheless under §2.65(c) (3) and (4). The information the State seeks is essentially the same as will be testified to by Mara Widseth, which the Court has determined to be admissible. Further, we believe the forced disclosure of what was revealed during group and individual therapy would significantly limit the future efficacy of such programs.

Finally, we note that while this ruling makes it unnecessary to address the State law issue, it appears that the Minnesota Legislature in Minn. Stat. 254A.09 and 595.02, Subd. 7, has provided confidentiality protections which would preclude this testimony even if the federal statute was not applicable.

ORDER

D.C. No. 79037
C.A. No. 81-2515

WHEREAS, the question of law posed by Defendant's Motion to suppress statements made by Defendant to his probation officer are both important and doubtful; and

WHEREAS, Defendant has requested that the Court report this case so far as may be necessary to present those questions of law and certify the report to the Supreme Court;

IT IS HEREBY ORDERED, that Defendant's Motion to suppress statements made by Defendant to his probation officer be certified to the Supreme Court, pursuant to Rule 29.02, Subd. 4, Rules of Criminal Procedure.

IT IS FURTHER ORDERED, that the February 16, 1982, trial date be stricken and that all proceedings in this case be stayed until the decision of the Supreme Court.

BY THE COURT

JONATHAN LEBEDOFF
Judge of District Court

Dated: February ——, 1982.

Appendix C

STATE OF MINNESOTA,

Plaintiff,

vs.

MARSHALL MURPHY,

Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS

DC FILE NO. 79037

CA FILE NO. 81-2515

The above-entitled matter came duly on for hearing before the Honorable Johathan Lebedoff, a judge of the above-named court, at the Hennepin County Government Center, Minneapolis Minnesota, on the 12th day of January, 1982.

Appearances:

Robert Lynn, Esq., Assistant County Attorney, appeared as counsel for and on behalf of the plaintiff.

Mark Wernick, Esq., appeared as counsel for and on behalf of the defendant.

Defendant was present.

Claudette Ask was present as court reporter.

[2] (January 12, 1982)

Mr. Lynn: Your Honor, this is State of Minnesota versus Marshall Donald Murphy, District Court File 79037 County Attorney's File 81-2515. We are present in chambers, Mark Wernick appearing on behalf of the Defendant Marshall Murphy, Robert Lynn on behalf of the State of Minnesota. Mr. Jerry Chaplin is here from Alpha House.

Mr. Zalasky: Jeff Zalasky.

Mr. Lynn: We are here in advance of taking testimony at the omnibus hearing, and trial is scheduled, your honor, I believe it's February 16.

The Court: Did you want to place something on the record, Mr. Wernick?

Mr. Wernick: Yes, Your Honor. My understanding is we are now about to go out in the courtroom and take testimony with regard to a statement made by Marshall Murphy to his probation officer, Mara Widseth. In order to cross-examine Ms. Widseth about that statement, it is going to be necessary for me to ask her questions as to why she was interviewing Mr. Murphy at that time. That will involve answers by Ms. Widseth which reflect conversations that she had with a psychologist at Alpha House which is where Mr. Murphy had been in treatment. And I want the record to be very clear that it is necessary I ask those questions to establish my client's Fifth Amendment rights, and I in no way intend to waive any privileges that he has by eliciting that testimony.

The Court: Okay. We will note that statement on the record, and now we can go out and take the testimony.

As long as we are on the record, the record may further reflect that we are going to take the testimony now, as I understand it, of two witnesses for the state, a police officer and Ms. Widseth. The defense may call the defendant as well. There's going to be no other testimony taken at this time, and it's the thought of all that a stipulation as to the other facts can be obtained and furnished to the court forthwith which would obviate the necessity of any additional testimony. If that proves unsuccessful, nothing in this hearing would foreclose an additional hearing be-

ing held for the sole purpose of taking additional testimony consistent with the issues raised in this hearing. Okay? All right. Let's go out.

Mr. Wernick: One more thing for the record. I had also asked the court, since this hearing will involve statements made by Mr. Murphy which may or may not be admissible at the trial, I have asked this court to conduct this hearing in chambers noting there are at least two members of the press in the courtroom.

The Court: All right. There was a timely motion. [4] Does the state have a position on that?

Mr. Lynn: Generally the state is opposed to closing any sort of hearing. I think if we warn these people involved, they understand their duties of free press and fair trial standards, and I think we can impose upon them not to publish this until the court's ruled.

The Court: Well, I don't know I can count on that. I am going to note on the record out in the courtroom a request was made that this be held in chambers. I am not, but I am just going to note that that was declined, and I hope that they use the same judgment that they have used.

[5] Mara Widseth

Mr. Lynn: Your Honor, the next witness the state would call at this time is Mara Widseth.

Mara Widseth, called as a witness, being duly sworn, testified as follows:

The Clerk: Please state your full name.

The Witness: Mara Widseth.

Direct Examination

By Mr. Lynn:

Q. Ms. Widseth, what's your occupation? A. Probation officer, Hennepin County.

Q. How long have you been a probation officer in Hennepin County? A. Since November of 1979.

Q. Do you know a man named Marshall Murphy?

A. Yes, I do.

Q. Is the man you know as Marshall Murphy seated to my right in this courtroom? A. Yes, he is.

Q. How is it that you know Marshall Murphy?

A. Marshall was placed on probation to me in 1980.

Q. I ask you to speak a little louder. I am having trouble hearing you. A. Marshall was placed on probation to me in 1980.

Q. Do you recall the date in 1980 that he was placed [6] on probation? A. The exact date was September 22, 1980.

Q. And for what offense was he on probation?

A. False imprisonment.

Q. Who was the judge involved? A. Judge Durda.

Q. For what period of time was he placed on probation? A. Three years.

Q. As his probation officer, are you familiar with the terms and conditions of his probation? A. Yes, I am.

Q. Can you tell us what those terms and conditions were? A. Yes. There are standard conditions of probation. Would you like those, also?

Q. I believe the court and counsel are familiar with those. A. Okay. The only special condition of probation that was ordered was that Marshall pursue treatment at Alpha House

Q. Did he in fact pursue treatment at Alpha House?

A. Yes, he did.

Q. Does your file indicate when it was he began that treatment at Alpha House? [7] A. It was—I don't—I do not have the exact date. It was sometime in between September 22 when he was originally placed on probation and October 15 when we next met.

Q. Now, you indicated you met with Marshall Murphy then on October 15, correct? A. Correct.

Q. At the time that he was placed on probation to you. did you go over with Marshall Murphy the conditions of probation, the normal ones and the specific ones?

A. Yes, I did.

Q. Is it customary in your experience with your probationers to meet with them from time to time? A. Yes, it is.

Q. What's your own practice in that regard? A. I am involved in the supervision of clients who are on probation, monitoring behavior, referring to community services or any outside needed services, and monitoring that, also.

Q. In regards to Marshall Murphy, did you make attempts to meet with him on a regular basis? A. Yes.

Q. Did you have a particular schedule that you would meet? A. Yes. Primarily it was once a month.

Q. Where did those meetings normally take place?

[8] A. Normally in the office, in my office.

Q. That's located in this building? A. Yes.

Q. How were those meetings set up? A. Marshall was required to contact me once a month by telephone and set up an appointment with me.

Q. Did he do that from the beginning in September or October of 1980? A. Yes, with a couple of exceptions he did.

Q. Did that continue on through the time that he was involved in the Alpha House program? A. Pardon me?

Q. Would those meetings continue during the time that he was involved in the Alpha House program?

A. Yes.

Q. At these periodic meetings at your office, without the details, what normally would you discuss? A. We would discuss any changes that had occurred in his situation, his life situation, since I had last met with him, his progress at Alpha House. He discussed his employment quite often, many problems that arose with that, or with personal relationships.

Q. Between September of 1980 and September of 1981, that one year period of time, do you know how many times—how many such meetings you had with Marshall Murphy? [9] A. Twelve. Twelve in-office meetings.

Q. All right. So my mathematics tells me that averages out to one a month? A. Yes.

Q. Besides the in-office meetings, what other contacts did you have with him in that period of time? A. Telephone contacts and field contacts which were at Alpha House when we met, also with Tim O'Brien, the director of Alpha House.

Q. As a part of your job as Marshall Murphy's probation officer, were you monitoring his progress at Alpha House? A. Yes.

Mr. Lynn: Your Honor, may we approach the bench for a moment?

(Discussion off the record.)

By Mr. Lynn:

Q. Ms. Widseth, at some time did you become aware that Marshall Murphy was no longer involved in the treatment program at Alpha House? A. Yes, I did.

Q. When did that happen? A. I received a telephone call from—

Mr. Wernick. Excuse me, Your Honor, may we approach the bench?

[10] The Court: Yes.

(Discussion off the record.)

The Court; The direct response to the question isn't how you found out or by whom—I think the question is when you found out. Can you tell us that?

The Witness: Yes. I believe it's July 31, 1981. Either July 31 or July 30. I can't read my writing very clearly.

By Mr. Lynn:

Q. I take it you learned at that point that Marshall Murphy was no longer involved in the program at Alpha House? A. That's correct.

Q. What action did you take, then, having learned that? Perhaps I can rephrase it. Was any sort of order for arrest and detention or probation violation brought about? A. No, there was not. I have a letter, a copy of a letter, written to Marshall on July 14 requesting him to contact me immediately regarding the absence of his participation in Alpha House. I probably found out about his non-participation in Alpha House prior to July 31 since the letter was dated July 14.

Q. You wrote him on the 14th of July and asked him to contact you about this situation? A. Right.

Q. Did he contact you? [11] A. Yes, he did.

Q. When was the next contact? A. He telephoned me—I don't have the telephone—the date of the telephone conversation recorded, but we did meet in the office July 21. 1981. The day is July 3, 1981, that I found out about his lack of participation in Alpha House.

Q. All right. So then you met with him on July 21, is that correct? A. That's correct.

Q. At that point was any action taken regarding his probationary status? A. No, there was not.

Q. After that meeting or at any time after July the 21st, did he return back to Alpha House or begin again at that program? A. No, he did not.

Q. Now, I'd like to ask you about September the 28th of 1981, move ahead a few months. Did you meet with Marshall Murphy that day? A. Yes, I did.

Q. Let me ask you, between the meeting you indicated you had July 21, '81, to discuss Alpha House and your meeting of September 28, were there any other meetings with Marshall Murphy? [12] A. Yes, there were.

Q. How many? A. One.

Q. When was that? A. September 11, 1981.

Q. All right. Let me focus if we can on the meeting of the 28th of 1981. Where did that take place?

A. That was at my office, also.

Q. Who was there when you met with Marshall Murphy? A. Just Marshall and myself.

Q. What did you discuss with Marshall Murphy in that meeting the 28th of September, '81? A. I discussed

with him information that I had received regarding his admission to a rape and murder which occurred several years prior to that.

Q. I take it you confronted Marshall with that information. A. Yes, I did.

Q. How did he respond to that? A. He became very angry that that information had been provided to me.

Q. Did he say anything further about the incident itself? A. Yes, he did.

Q. What did he tell you about that? [13] A. Marshall claimed that the false imprisonment incident which he was on probation for and the past rape and murder were unrelated as he did not commit the false imprisonment offense, and at the time that the rape and murder had occurred he was using drugs quite heavily. He said that they were not related because he was no longer using drugs, and he had been straight for quite some time.

Q. Why were the two of you discussing the relationship between those two events? A. I had expressed concerns to Marshall that with the new information that I had received that his actions in the false imprisonment offense and actions in the rape and murder that he had admitted to were strongly related behaviorally and that that needed to be dealt with continued treatment.

Q. Was that relationship important to you as his probation officer on the false imprisonment charge?

A. Yes, it was.

Q. Did you discuss with Marshall Murphy on September 28 the rape-murder incident that happened some several years prior? A. Yes.

Q. Do you recall if you can what you asked him and

what he told you about that? A. Yes. Marshall said that after he was released from [14] the service he was in an exclusive relationship with a woman; that he discovered that this woman was seeing another man at the time that they were supposedly in the exclusive relationship. He said that the other boyfriend also found out that she was seeing Marshall at the same time. He apparently beat the woman up—

Q. When you say he, who do you mean? A. The other boyfriend. The girlfriend came to Marshall's house, and he described her as being beat up very badly and bleeding, and he said that he was so disgusted with her behavior up to that point that he did not allow her into his house. He said his roommate came home shortly afterward, saw the girl sitting on—sitting in front of the house, and came in the house, asked Marshall why he didn't let her in, and Marshall said he didn't want anything to do with her.

The roomate apparently, according to Marshall, let the girl in, and there wasn't much else said about that particular incident. Marshall then went on to say that as time passed he became more despondent over the breakup of the relationship, and it was affecting him emotionally. He was using drugs quite heavily. He said that one night he went to a bar with one of his ex-girlfriend's best friends named Sherrie—I am sorry, not that he went to the bar with her but that he left the bar with Sherrie and another woman named Pam.

[15] Q. Do you recall what he told you about what happened after they left the bar? A. He said that they were walking home, the three of them, Pam, Sherrie and Marshall; that Pam eventually left the two of them and

walked her own way. Marshall continued to walk with Sherrie. He said that he attempted to make out with her but that she was not interested, and she continued to resist. He said that at that time he had a knife in his pocket which he pulled out, and he forced her into an alley. He said that in the alley he raped her. After he raped her he stood up. When he stood up he looked back at her. He said that she looked so scared that he then killed her. I asked him how he killed her, and he said that he strangled her with his hands

Q. Do you recall any further conversation about what happened that day? A. He said that he left the area, went to the store, purchased some cigarettes, went home, and went to bed.

Q. Can you describe Marshall Murphy's emotional state as you viewed him that date when he was telling you this? A. It wasn't until later on in our conversation when Marshall began crying. Otherwise, during that period of time when he was discussing the rape and murder incident with me, he appeared to be calm.

Q. Did he state to you during that conversation how he [16] felt about that event? A. Yes. He said that he felt he had committed the ultimate sin.

Q. At the time that Marshall Murphy came to your office that day, September 28 of '81, before you got into the conversation you have just discussed, did you tell him what you wanted to talk to him about? A. Yes, I did.

Q. Was he aware of what you wanted to talk to him about? A. Yes, he was.

Q. Did he ever refuse to answer any of your questions?

A. No, he didn't.

Mr. Lynn: I have nothing further, Your Honor.

The Court. Mr. Wernick?
(Defendant's Exhibits 1 and 2 marked for identification.)

CROSS-EXAMINATION

By Mr. Wernick:

Q. Miss Widseth, I am showing you a one-page document marked for identification as defendant's exhibit 1. Can you identify what that is? A. Yes, that is the defendant's formal probation [17] order.

Q. That is an order signed by Judge Durda, and it lists the conditions of his probation? A. Yes, that's correct.

Q. And then showing you a document marked for identification as defendant's exhibit 2, can you identify what that is? A. That is the defendant's temporary probation order.

Q. And that is a document signed by Marshall Murphy? A. Correct.

Q. And this document also sets forth the conditions of Marshall's probation? A. That's correct

Mr. Wernick· Your Honor, I will offer defendant's exhibits 1 and 2.

Mr. Lynn: Ask just one question, Your Honor?

The Court: Certainly.

Mr. Lynn· Miss Widseth, these two documents marked as defense exhibits 1 and 2, are they the only two documents setting out the conditions of probation that were shown to Marshall Murphy?

The Witness: Yes, that's correct.

Mr. Lynn: No objection

The Court: Received.

By Mr. Wernick:

[18] Q. Ms. Widseth, on the document that you have which is signed by Marshall, exhibit 2, that document—I am looking in the second paragraph—describes your job as the official representative of the court. Is that true? A. Yes.

Q. And then it tells him that he is ordered to obey the conditions that are set forth. A. That's correct.

Q. And one of those conditions is be truthful to your probation officer in all matters, is that true?

A. That's correct.

Q. And another condition is to report to his probation officer as directed by you. A. That's correct.

Q. If Mr. Murphy would fail to abide by these conditions, that would be grounds for you to seek an arrest and detention order from Judge Durda, is that true?

A. That's correct.

Q. Were you present at the sentencing, at Marshall Murphy's sentencing, on the false imprisonment charge?

A. No, I was not.

Q. Now, up to the time that Mr. Murphy saw you in July, he would call you on the phone on his own initiative and make an appointment to see you, is that true?

A. That's correct, for the most part.

[19] (Defendant's Exhibit 3 marked for identification.)

By Mr. Wernick:

Q. Showing you a one-page document marked for identification as defendant's Exhibit 3, can you identify what that is? A. It is a letter I wrote to Marshall on July 14, 1981, requesting him to contact me immediately.

Q. And that is the letter which you wrote as a result of receiving information about his attendance at Alpha House? A. That's correct.

Mr. Wernick: I would offer defendant's Exhibit 3.

Mr. Lynn: No objection, Your Honor.

The Court: All right.

By Mr Wernick:

Q. In that letter you informed Mr. Murphy that failure to respond to the letter will result in an immediate request for a warrant. Is that true? A. That's true

Q. To the best of your recollection, Ms. Widseth, is that the first time that you had written Mr. Murphy such a letter to have him come talk to you? A. I also wrote a letter on September 24 asking him to contact me.

Q. Okay. Is the July letter the first letter that [20] you had written? A. Yes.

Q. Now, at the meeting you had with Mr. Murphy in July in response to that letter, did Mr. Murphy tell you that he did not want to do further treatment? A. That's correct

Q. And the result was that you told him you would not violate his probation because he seemed to be doing okay generally? A. That's right.

Q. Now, at that point you still had the authority to change your mind and order more treatment if further information came to you as you thought it warranted treatment. A. That would be questionable.

Q. When you saw Mr. Murphy on September 11, was that a meeting that he set up on his own? A Yes, it was

Q. Let me ask you this, Ms. Widseth: On October 2 of 1981, did you cause an arrest and detention warrant to be issued against Mr. Murphy? A. That's correct.

Q. And one of the allegations that you have as grounds for this arrest and detention warrant is that although defendant pursued treatment at Alpha House, he was terminated [21] for failure to actively work on a problem area and to comply with the terms of the group. Was that the grounds for the arrest and detention warrant that you alleged? A. Yes.

(Defendant's Exhibit 4 marked for identification.)

By Mr. Wernick.

Q. Showing you another one page document marked for identification as defendant's Exhibit 4, will you identify what that is? A. That is a letter I wrote to Marshall Murphy on September 24, 1981, requesting him to contact me upon his receipt of the letter.

Q. And is this the letter you wrote in response to the information you had received that you described earlier?

A. Yes.

Mr. Wernick: I will offer defendant's Exhibit 4.

Mr. Lynn: No objection, Your Honor.

The Court: Received.

By Mr. Wernick:

Q. Ms. Widseth, you testified earlier that you had received some information about what Marshall had been saying, is that true? A. Yes.

Q. That was on September 22, 1981, that you [22] received that information? A. Yes.

Q. Now, at the time you were told about that information, were you also told that Mr. Murphy was not arrested for lack of evidence? A. Yes.

Q. On September 24, did you go to your supervisor and have the discussion with him about what you should do with this information? A. Yes.

Q. Did your supervisor tell you and did you decide that you were obligated to report this information to the police? A. That's correct.

Q. Did you also decide on that date that you would be informing Marshall of this decision? A. Yes.

Q. On September 28 then, that is the day you talked with Marshall in your office, correct? A. Correct.

Q. Prior to Marshall making this statement about the murder, you told him the substance of the information you had received. A. Yes, that's correct.

Q. Did you also tell him that although you had [23] previously allowed him to continue on probation without treatment, that you now strongly felt he needed further treatment? A. That's correct.

Q. Would it be fair to say that Marshall's response was at that time that he became angry with you?

A. That's right.

Q. Did he tell you that he felt like calling an attorney?

A. Yes, that's correct.

Q. And when Marshall told you that he felt like calling an attorney, your response was that he would have to do that outside of the office, is that true? A. That he would have to deal with it outside of the office, that's correct.

Q. You told him that he would have to deal with it outside the office because your main concern at this time was another issue, the fact being that there was two related incidents. Is that what you said? A. Yes, that's correct.

Q. The subject of your conversation with Mr. Murphy from your point of view, from what you told Mr. Murphy rather, was that you thought it was necessary to talk about

whether he needed more treatment. Is that a fair statement? [24] A. That's correct.

Q. Now, before Mr. Murphy—

Mr. Lynn: Your Honor, may I have a moment?

The Court: Take a moment, certainly, go ahead.

(Discussion off the record.)

The Court: We will take a five-minute recess, and then when the attorneys are free I will see them in chambers.

(Recess.)

The Court: Go ahead, Mr. Wernick. Sorry for the interruption.

By Mr. Wernick:

Q. Ms. Widseth, before Mr. Murphy started talking about the murder case, he first talked to you about the false inprisonment case, is that true? A. That's correct.

Q. And before that you had told him that you thought these two incidences were related. A. That's right.

Q. And you also testified that he told you essentially that he was innocent of that charge, the false imprisonment. A. Yes.

Q. Did you believe him when he said that? A. No, I did not.

Q. And did you confront him about that?

[25] A. Yes, I did.

Q. Did Marshall persist with his innocence after you had confronted him about that? A. Yes, he did.

Q. Now, was your reason—strike that. When I use the term confront, you asked him questions about it, is that true? A. About the false imprisonment charge, yes.

Q. And then it was—well, let me ask you, Mrs. Wid-

seth, what does it mean to confront someone when you are counseling him? A. What does it mean?

Q. Yes, when you say confront. A. I reviewed the—as Marshall and I were sitting there, I reviewed the factual information regarding the offense and the presentence investigation and the police report. And I asked him about specific incidences that were reported by the victim and statements that he had given regarding the offense.

Q. You were trying to show the inconsistencies in his story. Would that be a fair statement? A. Not in his story; in his story as compared to the victim's.

Q. Would it be fair to say that you were pushing him on that point, whether or not he was innocent?

[26] A. That's correct.

Q. And it was after that that he started talking about this murder case, is that true? A. Yes.

Q. And it was after he talked about the murder case that you first told him that you thought it was your obligation to go to the police. Is that true? A. That's correct.

Q. At that time did you encourage Marshall to turn himself in to the police? A. Yes, I did.

Q. And Marshall said he didn't want to do that. Is that true? A. No.

Q. Did Marshall tell you he wanted time to think about whether or not he wanted to do that? A. That's correct.

Q. And you gave him permission to think about that.

A. Yes.

Q. Did Marshall at that time tell you that he knows you must really care about him because you were giving him permission to think about it as opposed to just turning him in right then and there? A. No. That's not correct.

Q. Well, did he say to you—let me rephrase it—[27] that he thought you must really care about him to have him come in and talk about this because you could have just picked up the phone and started dialing the police? A. That's correct.

Q. How long after your interview with Mr. Murphy did he finally leave your office? A. After my interview with him?

Q. Yes. A. Immediately.

Q. Mr. Murphy's condition at the end now when you are talking about this is that he was crying, is that right?

A. That's right.

Q. He had lost his composure? A. That's correct.

Q. Isn't it true that Mr. Murphy had to stay at your office for a period of a few minutes to compose himself before he left? A. I would say approximately five minutes while we continued to talk, yes.

Mr. Wernick: Nothing further.

Redirect Examination

By Mr. Lynn:

Q. Ms. Widseth, again on the 28th of September the interview with Marshall Murphy was in your office, correct? [28] A. Correct.

Q. Was the door to that office locked? A. No, it wasn't.

Q. Did you have any sort of restraint on Marshall Murphy of any kind? A. No.

Mr. Wernick: Objection, legal conclusion.

The Court: Well, I guess I don't know what restraint means there either.

By Mr. Lynn:

Q. Was he handcuffed in any way? A. No, he wasn't.

Q. Was he free to leave if he chose to get up and walk out?

Mr. Wernick: Objection, legal conclusion.

The Court: Well, in your opinion.

By Mr. Lynn:

Q. Was he free to get up and leave if he chose to?

A. Yes, he was.

Q. There were just the two of you present during that conversation? A. Correct.

Q. Now, you indicated that the first part of your conversation or much of it had to do with this false imprisonment charge. [29] A. Yes.

Q. At some point you told Marshall Murphy that you were obligated to go to the police about the rape-murder situation. A. Right.

Q. Was that before or after he told you the details of that offense? A. I believe it was after.

Q. You indicated that—back up again. Before you talked to Marshall Murphy on that date, had you had any contact with any police officer about the Sherrie Cole case, the rape-murder case? A. No, I had not.

Q. Did you have any of the police reports or files or autopsy or anything about that case? A. No, I hadn't.

Q. You indicated that at one point Marshall Murphy made mention of he ought to see a lawyer? A. Yes.

Q. Am I correct that that was in the context—

Mr. Wernick: Objection, leading.

The Court: Well, it sounded like it would have been, but I guess we won't know unless he asks it. Well, go ahead and ask it.

By Mr Lynn:

[30] Q. Was that in the context of a civil lawsuit?

Mr. Wernick: Well, objection, leading and a legal conclusion.

The Court: Well, I don't have the whole question before me.

Mr. Lynn: I will rephrase it, Your Honor.

By Mr. Lynn:

Q. You indicated that Marshall Murphy became angry, correct? A. Correct.

Q. He said something about a lawyer, is that correct?

A. That's correct.

Q. Do you recall specifically what he said? A. Yes, he said that he was so angry that the information about his admission to the rape and murder had been given to me that he felt like calling a lawyer. He felt that that violated his confidentiality.

Q. You also indicated that towards the end of the conversation you encouraged Marshall Murphy to turn himself in. A. That's correct.

Q. Do you recall what his response to that was? You indicated he wanted some time, correct? A. That's right.

[31] Q. Do you recall what you told him at that point? A. I told him that it was my legal responsibility to report the information to the police regardless of his decision, whether or not he would turn himself in

Q. Did he say anything about that back to you?

A. Yes. He did say to me that he understood that I would need to do that, and that's when he also went into his statement about he felt I really cared about him because he knows I could have just picked up the phone and dialed the police.

Q. Do you recall any conversation about whether or not he would talk to the police himself? A. No.

Q. Do you recall—or did you prepare some, at the time of these conversations, some handwritten notes?

A. Yes, I did.

Q. Did you bring those with you today? A. Yes.

Q. Let me call your attention to the fourth page of those notes towards the very end, three or four lines up, were those notes prepared at the time or shortly after the time that you talked to Marshall Murphy about this?

A. The following day.

Q. Were they accurate as best you recall as to what was said between the two of you? [32] A. Yes.

Q. Would it refresh your recollection if you could review the notes regarding my question? And I will ask you to read the last six or eight lines of your notes.

A. Yes.

Q. Do you recall how he responded now?

A. When I told him it would be my legal responsibility to report the matter to the police, he said that he understood that but that it would just be my word if he didn't confess to the police. Was that right? And I told him that to the best of my knowledge that would be correct.

Q. Calling your attention to defendant's Exhibit 4, your letter of September 24 of 1981, did that letter contain any threat to seek a warrant if Mr. Murphy did not come to your office?

The Court: Well, those letters speak for themselves. I need no further testimony on that point.

Mr. Lynn: Nothing further.

The Court: Any further testimony of this witness?

Mr. Wernick: Yes, Your Honor, a couple.

The Court: Go ahead.

Recross-Examination

By Mr. Wernick:

Q. Ms. Widseth, about this question about a lawyer, in [33] your job as a probation officer you meet many people who have legal problems, I take it. Is that true? A. That's correct.

Q. And oftentimes people who have legal problems with the criminal law have other legal problems as well, whatever they may be. A. Yes.

The Court: I am sorry. I wish we could focus in here on just some questions relative to a Rasmussen hearing.

Mr. Wernick: All right.

By Mr. Wernick:

Q. Well, would you agree, Ms. Widseth, that oftentimes people who have legal problems, they don't know what the legal problems are, but they know they have legal problems?

Mr. Lynn: I guess I will object. It's irrelevant.

The Court: It's vague. I don't know what it's leading to, and—

Mr. Wernick: I will withdraw the question.

The Court: All right. This court is going to, in assigning the issues involved here, use some of its ten years experience as a trial judge in ascertaining the relationship of a probationer and a probation officer, and I would hope the two attorneys could have a small amount of confidence in the court's ability to do that. And I surely [34] don't know of any questions that are going to assist the court in that process, or as a certainty I haven't heard any yet.

Mr. Wernick: I have nothing further.

Mr. Lynn: I have nothing further, Your Honor.

The Court: All right. You can step down. Thank you. Well, I am sorry, Ms. Widseth. So that I understand this fully, when you sent for the defendant and asked to speak to him, you knew, did you not, that you were going to speak to him on the topic of information you heard about the possible rape-murder.

The Witness: Yes.

The Court: And do I understand from your testimony that you also knew in advance that you were going to pass that information on to the police?

The Witness: Yes.

The Court: Did you advise him in advance of that fact before questioning him?

The Witness: No, I did not.

The Court: Okay, Thank you. You can step down.

Gentlemen, will you approach the bench, please?

(Discussion off the record.)

The Court: All right. Does the state have any further witnesses?

Mr. Lynn: No, Your Honor.

[35] The Court: All right. It's my understanding the defense is going to proceed and call a witness, and given the hour and the fact that the defense does not wish to interrupt that testimony, and since it's about two minutes short of our normal adjournment time, we will take our adjournment for the day.

I'd ask the attorneys and the defendant to be present at 9:15 tomorrow morning. and I'd ask the jail to please have him here ready to go at 9:15, and with that we will stand adjourned until 9:15 tomorrow morning.

(Court was adjourned until 9:15 the following day.)

[36] Marshall Murphy

(January 13, 1982, 9:15 a.m.)

Mr. Wernick: Your Honor, I will call Marshall Murphy.

Marshall Murphy, called as a witness, being duly sworn, testified as follows:

Direct Examination

By Mr. Wernick:

Q. Mr. Murphy, how old are you? A. 29.

Q. Prior to being arrested on this offense, what was your occupation? A. I was a broiler chef at the Registry Hotel.

Q. How long had you been employed there?

A. Three years.

Q. Mr. Murphy, directing your attention to September 28, 1981, did you go see Mara Widseth, your probation officer, on that date? A. Yes, I did.

Q. What caused you to go see her on that date?

A. I received a letter in the mail stating that she wanted to talk to me.

Q. And what did you think would happen if you—let [37] me ask you this: what did the letter say that she wanted to talk about? A. She said—

Mr. Lynn: The letter is in evidence.

Mr. Wernick: It's preliminary—

The Court: Go ahead and answer it.

A. Talk about further treatment plans.

Q. What did you think would happen if you did not respond to that letter? A. Well, I would have been violated.

Q. When you went into the office then on September 28, what did you think you were going to be talking about?

A. Further treatment plans.

Q. What was your reaction when your probation officer told you about the information she had received that we talked about yesterday? A. I was, you know, shocked and angry.

Q. Did the subject of an attorney come up? A. I asked her if—well, I said I feel like I should have an attorney present.

Q. Why did you feel like you should have an attorney present? A. Well, the subject matter we were talking about, little flags went up in my head, and you know, I felt like I needed an attorney at the time.

[38] Q. And what was Mara's demeanor right after you said that? A. She seemed like kind of angry and frustrated.

Q. What did she say to you? A. She said we didn't have to worry about having an attorney there now. We had more important things to talk about.

Q. What was that she wanted to talk about?

A. About the case at hand.

Q. Did you feel you were free to leave at that time?

A. No, I didn't.

Q. What did you think would happen if you left at that time? A. Well, if I would have got up and walked out of the office, I would have been violated.

Q. Did you want to talk to her about further treatment at that time? A. No.

Q. What were your feelings about going to treatment at that time? A. I, you know, I have been involved with treatment for the past three years, and I was beginning to

feel like I was, you know, institutionalized after awhile—not three years, but since '77

Q. Why did you then continue to talk to her at that [39] time? A. She wanted to talk to me.

Q. What was your physical condition at that time?

A. I was tired.

Q. How long had you been up? A. About 24 hours.

Q. What time did you get to Miss Widseth's office on September 28? A. 10 a.m.

Q. What did you do the previous night? A. I worked the graveyard shift.

Q. What time did you start work? A. 10:00 o'clock.

Q. And what time did you get off work? A. 6:00 o'clock in the morning.

Q. What reason did Mrs. Widseth give you for saying that you needed more treatment? A. She was looking at the—my false imprisonment charge and the murder as being related.

Q. Which of those two incidences did you talk about first? A. The false imprisonment charge.

Q. Just briefly. what did you say about that?

A. Well, I was trying to tell her—you know, she was bringing it up, and I was trying to tell her, you know, about [40] my innocence and that, you know.

Q. What was her reaction to that? A. She was mad.

Q. How did the subject change from that to the other case, the murder case? A. She brought it up.

Q. What did she say? A. She wanted me to talk more about that.

Q. At that time did it occur to you that she was going

to go to the police with what you said? A. No, it didn't.

Q. When did you first know she was going to go to the police? A. After we were done talking about it, she mentioned that it was her obligation.

Q. What did she ask you to do? A. She was trying to convince me to turn myself in.

Q. And what was your response? A. I told her I couldn't do that.

Q. How long after you left Mrs. Widseth's office—how long after that did you contact an attorney?

A. That evening.

Q. How many attorneys did you call that evening?

A. Three.

Q. When did you next talk to Mrs. Widseth?

[41] A. Not the following day but the day after.

Q. And what did you tell her? A. I told her that my attorney advised me not to turn myself in.

Q. Mr. Murphy, at the time you started talking about this, did you know you had the right to remain silent at that time? A. No, I didn't.

Q. Did you know you had the right to consult with an attorney at that time? A. No, I didn't.

Mr. Wernick: I have nothing further.

Cross-Examination

By Mr. Lynn:

Q. Mr. Murphy, you had been dealing with Mara Widseth as your probation officer for about a year at this time, as of September of '81? A. Correct.

Q. During that time you had met with her in her office at least, what? A dozen times? A. Yeah.

Q. Plus you had spoken to her on the phone a dozen times? A. Yes.

[42] Q. How far did you go in school? A. I got a G.E.D., and I have a certificate for cook chef program.

Q. Where did you get that? A. Brooklyn Center Suburban Hennepin North Campus.

Q. The Vocational Technical School? A. Right.

Q. You were also in the military, were you not?

A. Yes, I was.

Q. What was your job there? A. I was in the combat engineers, but I was a bus driver.

Q. Now, you indicated that over that year's period of time when you would be dealing with Mrs. Widseth many of those interviews were in her office, right?

A. All of them were.

Q. All of them were? A. Except for one.

Q. Some of those interviews, did you call her and come in on your own? A. Yes.

Q. And some of those interviews were in response to a letter by her? A. Yes.

Q. You have been in trouble with the law before, [43] have you not? A. Yes, I have.

Q. You have been through the court system a couple of times, haven't you? A. Yes, I have.

Q. And you have dealt with police officers, courts, prosecutors and defense lawyers on several occasions over the past several years? A. Yes, I have.

Q. In July of last year, '81, you were terminated or at least left the Alpha House program, is that correct?

A. That's correct.

Q. And at that time you met with Mara Widseth, correct? A. Yes, I did.

Q. She did not revoke your probation based upon that, did she? A. No.

Q. She was concerned about—at that time she felt you were okay on your own? A. Yes.

Q. When you went to see her on the 28th of September, it was to discuss the subject of treatment once again, correct? A. Yes.

[44] Q. And in fact, you did discuss further treatment with Mara Widseth on that occasion, the 28th.

A. We touched on it.

Q. She expressed to you her concern between the relationship of the old case, the one involved here, and your false imprisonment case that you were on probation for? A. Yes.

Q. She told you that it was her feeling you still needed more treatment? A. Yes.

Mr. Lynn: I have nothing further, Your Honor.

Redirect Dxamination

By Mr. Wernick:

Q. Mr. Murphy, how many other probation officers have you had besides Mara Widseth? A. Two.

Q. Has anything like this ever come up in your experience with a probation officer? A. Would you clarify on that?

Q. Have you ever had a probation officer go to the police and tell them what you had been saying to her?

A. No.

Mr. Wernick: I have nothing further.

Mr. Lynn: I have nothing further, Your Honor.

[46] CERTIFICATE

I, Claudette Ask, one of the official court reporters of the Fourth Judicial District of the State of Minnesota, do hereby certify that the foregoing is a true and correct transcript of my stenotype notes taken at said time and place.

/s/ Claudette Ask
Official Court Reporter

Defendant's Exhibit 1

STAY OF EXECUTION AND PROBATION ORDER

On August 19, 1980, the above-named defendant was duly convicted of the crime [of] false imprisonment and thereafter [, on] September 22, 1980, was sentenced for commitment to the Minnesota Correction Authority, Stillwater, Minnesota, for a period not to exceed 15 months.

And the Court being of the opinion that by reason of the character of defendant and the instances of this case it will be for the best interest of defendant and the best interest of justice [that] execution of sentence be stayed for the period of three (3) years and upon the condition this order hereinafter specified.

NOW THEREFORE IT IS ORDERED that the execution of sentence for the period of three (3) years is hereby stayed and defendant is placed on probation until September 21, [1983,] and assigned to the Hennepin County Department of Court Services for supervision.

Said stay and probation are granted, however. upon the express condition that during the continuance of said stay defendant shall observe the following order, rules and regulations

Be truthful to your Probation Officer in all matters.
Keep your Probation Officer informed at all times of your place of residence and employment, make no change in these without the knowledge and consent of your Probation Officer.
Do not leave the State of Minnesota without the consent of your Probation Officer.
Report to your Probation Officer as directed.
Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.
Obey all local ordinances and state and national laws.
In the event you are arrested by any law enforcement office, you shall immediately notify probation officer and report the matter.
Comply strictly with any additional requirements that may be imposed by the Court or your Probation Officer during the term of your probation.
Pursue treatment at Aipha House.

NOTE: Any person convicted of a felony loses his civil rights, including the right to vote in this state the right to hold public office until the stay of sentence expires.
It is unlawful for any person convicted of a felony to possess, use or receive any firearms. The Public Law 90-618, Gun Control Act of 1968

Should defendant violate any of the conditions herein specified, or should it hereafter satisfactorily appear that sentence should be enforced, said stay may at any time prior to expiration [be] revoked and sentence executed.

DATED:————————

P.O.: Mara H. Widseth (348-5269)

CHESTER DURDA
Judge of the District Court

Defendant's Exhibit 2

DEPARTMENT OF COURT SERVICES
ADULT PROBATION DIVISION

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Minneapolis, Minn. 55487 9-22-80

To Marshall D. Murphy

As permitted by law, the Court is granting you the privilege of probation in place of imprisonment or other punishment. It does so because it believes that you are able to overcome the difficulties which brought about your arrest.

The Court will be kept informed regarding your progress through your Probation Officer, who, as the official representative of the Court, will try to aid you in every possible way to justify the confidence which the Court has placed in you.

Probation is an opportunity for you to prove to the Court that you can and will conduct yourself as a good citizen, without necessity of penal confinement. For the present you are only conditionally released. If you comply with the conditions of your probation you may expect to be discharged at the expiration of the period stated. If you fail to comply with the requirements you may be returned to Court at any time for further hearing or com-

mitment. It is hoped that you will want to earn your release in the shortest possible time.

It will be necessary for you to obey strictly the following conditions:

BE TRUTHFUL to your Probation Officer in all matters.

Keep your Probation Officer informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of your Probation Officer.

Report to your Probation Officer as directed.

Do not leave the State of Minnesota without the consent of your Probation Officer.

Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.

Obey all local ordinances and state and national laws.

Comply strictly with any additional requirements that may be imposed by the Court and Probation Office during the term of probation.

It is unlawful for any person convicted of a felony to pursue use or receive any firearms. Title 7, Public Law 90-618, Gun Control Act of 1968.

In the event that you are arrested by any law enforcement officer you shall immediately notify your probation officer and report the matter.

If your conviction is for a felony you have lost the right to vote and hold public office until the stay of sentence expires.

You are to pursue treatment—Alpha treatment.
I have read and received a copy of the above instructions.
I have read and fully understand the above instructions.

/s/ Marshall D. Murphy

/s/ _____

Probation Officer

Defendant's Exhibit 3

DEPARTMENT OF COURT SERVICES
DISTRICT COURT PROBATION
A-1100 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

July 14, 1981

Mr. Marshall Murphy
4100 12 Avenue South
Minneapolis, Minnesota 55407

Dear Marshall:

In view of your recent Alpha House attendance difficulties, I am requesting that you contact me immediately. Failure to do so will result in an immediate request for a warrant.

Mara M. Widseth
Probation Officer
348-5269

MW/gl

Defendant's Exhibit 4

DEPARTMENT OF COURT SERVICES
DISTRICT COURT PROBATION
A-1100 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

September 24, 1981

Mr. Marshall Murphy
4140 43 Avenue South
Minneapolis, Minnesota 55406

Dear Marshall:

To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment.

Mara Widseth
Probation Officer
348-5269

MW/gl

Appendix D

APPEARANCE

DC File 79037

CA File 81-2515

The above entitled matter came duly on for hearing before the Honorable Jonathan Lebedoff, one of the Judges of the above-named Court, on September 23, 1982.

APPEARANCES:

Robert Lynn, Assistant County Attorney, appeared on behalf of the State.

Mark Wernick, Esq., appeared on behalf of the defendant.

The Defendant was present.

Claudette Ask, Reporter.

[2] Mr. Lynn: This is the matter of State of Minnesota versus Marshall Donald Murphy, District Court File 79037, County Attorney's File 81-2515. I am Robert Lynn, Assistant Hennepin County Attorney. Mr. Murphy is present with his attorney Mr. Mark Wernick. We are before this Court this morning, Your Honor, because the defendant is charged by an indictment with murder in the first degree. As the Court is aware, we had an omnibus hearing in this matter surrounding a confession. The Minnesota Supreme Court, having heard that issue as certified, the questioning of the defendant, suppressed that particular confession in a decision dated August 31 of this year. 1982.

We are back before this Court then as a continuation of that omnibus hearing which was held May 16 of '82 to determine the remaining motions and the status of Mr. Murphy.

I will inform the Court, as I have already, and counsel that the State does plan to petition for writ of certiorari to the United States Supreme Court for a review of the Minnesota Supreme Court decision in this matter. I anticipate that that process, should that petition be granted and heard, will take well over one year, probably 18 months, perhaps more. That's the time period we are dealing with before we can proceed with this case [3] any further.

The Court: All right. Of course, this case was specially assigned to this Court for trial. The Court preparatory to selecting a jury on the charge of murder in the first degree had the so-called omnibus II hearing, and at that time the Court dealt primarily with the admissibility into evidence of the alleged confession of the defendant. This Court obviously held that the confession was admissible, as already indicated by the County Attorney.

That ruling was reversed by the Minnesota Supreme Court last week and in a 7 to 2 vote they determined that the confession was inadmissible.

This case is now, I believe—well, the Supreme Court has ordered this case remanded to this Court, and we have not yet received the original file back from the Supreme Court. However, the attorneys have asked for this hearing, and I will now await any motions.

It's my understanding that there is now going to be a bail motion made.

Mr. Wernick: Yes, Your Honor, but first I think procedurally, Your Honor, I do have a motion to dismiss the indictment pending before the Court for insufficient evidence, inadmissible evidence before the grand jury. I renew the motion at this time expecting full well that

[4] the Court, if it were to grant the motion, would stay its position to allow the State to appeal, but for the record I do renew that motion.

The Court: Mr. Lynn, do you wish to respond?

Mr. Lynn: Only to say this, Your Honor: that the grand jury transcript as viewed now, taking out the suppressed confession, there is insufficient evidence at this point to proceed further with the prosecution.

The Court: All right. I appreciate the candor of the County Attorney on that point. That fact is obvious to this Court as well. The importance of the inadmissibility or admissibility of the confession is total to the prosecution of this case in this Court's view.

This Court has reviewed the motion originally raised at the omnibus hearing by Mr. Wernick, and we do feel that given the inadmissibility of the confession, that there is not remaining sufficient evidence to do other than grant Mr. Wernick's motion. Accordingly, at this time Mr. Wernick's motion to dismiss raised at omnibus hearing is granted. The granting of that motion, however, is stayed at this time pending a final determination by the United States Supreme Court.

Is there anything further?

Mr. Lynn: Only, Your Honor, that pursuant to Minnesota Rules of Criminal Procedure 17.06, all the subdivisions, [5] I already have, but I will again serve notice that we do plan to appeal this matter. The time length is such that again, it will be at least a year and a half, possibly longer, so we would ask for the stay to be in effect until there is some determination by the United States Supreme Court as to whether they are going to hear this matter or not.

The Court: Yes. I thought my order staying the granting of Mr. Wernick's motion encompassed the final determination by the United States Supreme Court. And lest there be any confusion about that, this Court will now order that this stay be in effect until further order of this Court.

Until such time as either party feels there is a determination by the United States Supreme Court, you can then petition me to vacate the stay, but until such order the stay is in effect.

Since we now have stayed this for a review of the United States Supreme Court and apparently there is no dispute about the fact there is an 18-month to two year time frame there, and since I further understand that pursuant to this matter the defendant is in a custodial setting, I would await any motions relative to bail.

Mr. Wernick: Your Honor, as the Court knows, Mr. Murphy is now on probation to Judge Durda. Mr. Murphy [6] has been incarcerated for almost one year now not only as a result of the bail on the murder charge but also as a result of an arrest and detention order from Judge Durda. Earlier this week Judge Durda quashed the arrest and detention order and told counsel that he was not revoking probation.

I am going to take no further action on that at this point, but I do want this record to reflect, because I haven't made a record on this yet, that in my view the time that Mr. Murphy spent in custody for Judge Durda does count towards that sentence if the time were to come that Judge Durda were to revoke his probation. But I am making my record on that only.

I am now not objecting to the fact that Mr. Murphy

stay on probation status, and I'd ask the Court to set bail in the amount of $5,000 in addition to any other non-monetary conditions of release that the Court deems appropriate.

The Court: Does the State wish to respond to that motion?

Mr. Lynn: Yes, Your Honor. As to Mr. Murphy's present status, Judge Durda did not revoke, and that was basically a joint request, anticipating that Mr. Murphy will be on some sort of a bail status. It was my feeling I would also like him under the supervision of [7] a probation officer at least until September of '83 when he gets off of probation to Judge Durda. Again, Your Honor, we are operating under Rule 17 of the Rules of Criminal Procedure which provide in a situation like this for the Court to set a bail or make other conditions of release pending this appeal.

Your Honor, the $5,000 figure that has been recommended, I believe, by counsel in my view, combined with a rather close supervision by the Department of Court Services as best they are able under the circumstances, is a reasonable situation, given the time period and the uncertainty of the outcome of this appeal, so I have no opposition to that at this time.

The Court: All right. Thank you, Mr. Lynn. Based on the Court's assessment of the facts and the acquiescence in the $5,000 request by the State for the reasons just stated by Mr. Lynn, this Court at this time will order that the defendant may be released pending outcome of this matter on the conditions that, first, he post bail in the amount of $5,000 and, second, that he be under what we would call close supervision of the Department of Court Services.

Mr. Barbeau is present in Court who I believe has been assigned now to be his probation officer, and, Mr. Barbeau, I would ask you to set up any form of communication [8] that you feel is consistent with this Court's order of close supervision, given the facts of this case.

Probation Officer: Yes, Your Honor.

The Court: All right. Is there anything further before us?

Mr. Lynn: I believe not, Your Honor. I will keep the Court and counsel posted on the progress of the appeal when we have completed the documents.

The Court: This is an unusual case, and I think it's fair to say that all the parties to the case recognize that a successful prosecution of this case rises or falls on the admissibility of the confession that was the question of the appeal to the Minnesota Supreme Court. This Court obviously ruled that the confession was admissible. The Supreme Court by a 7 to 2 vote took an opposite view. I am not questioning either their judgment or the process. I respect both. And I would note on the record that this Court does feel that the ultimate admissibility of the confession, for whatever final effect that might have, is a very close question of law in this Court's judgment involving public policy questions and the ultimate use of the exclusionary rule. For those reasons this Court feels, whatever the final result may be, it is quite appropriate that this matter be appealed to the United States Supreme Court so that they can have their final input on what this [9] Court considers a very fundamental and important question. Thank you.

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No. 82-827

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED ON NOVEMBER 9, 1982
CERTIORARI GRANTED ON JANUARY 17, 1983

1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

IN THE

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JOINT APPENDIX

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Memorandum and Order of the Hennepin County District Court B-1
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Partial Transcript of Motion to Dismiss Proceedings .. D-1

RELEVANT DOCKET ENTRIES

October 2, 1981	Complaint charging respondent with Murder in the Second Degree filed
October 29, 1981	Indictment charging respondent with Murder in the First Degree filed
January 12-13, 1982	Pretrial Hearing held
January 5, 1982	Defendant's motion to suppress statements made to probation officer filed
February 2, 1982	Order denying defendant's motion to suppress statements made to probation officer filed
February 3, 1982	Trial court certifies appeal to the Minnesota Supreme Court
August 31, 1982	Opinion of the Minnesota Supreme Court suppressing statements made to probation officer filed
September 21, 1982	Judgment of the Minnesota Supreme Court entered
September 23, 1982	Trial court dismisses indictment and stays dismissal pending appeal to this Court
November 9, 1982	Petition for Writ of Certiorari filed
December 8, 1982	Brief in Opposition filed
December 13, 1982	Reply Brief filed
January 17, 1983	Petition for Writ of Certiorari granted

A-3

State of Minnesota County of HENNEPIN DISTRICT Court

CCT 1 SECTION/Subdivision 609.185(2)

U.O.C. 0904 GOC N

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Indictment

FILED

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HENNEPIN COUNTY MINNESOTA COURT ADMINISTRATOR

State of Minnesota

PLAINTIFF,

VS.

☒ FELONY ☐ GROSS MISDEMEANOR

NAME: first, middle, last	Date of Birth	S/IS COMPLAINT NUMBER
MARSHALL DONALD MURPHY	12/4/52	27-11-2-025341
		~~27-11-3-025342~~
		~~27-11-4-025343~~
		~~27-11-5-025344~~
		~~27-11-6-025345~~
		~~27-11-7-025346~~

DEFENDANTS.

INDICTMENT

The above-named Defendant (s) is/are hereby accused and charged by the Grand Jury of the above-named County, in the State of Minnesota, by this indictment of the offense (s) of:

MURDER IN THE FIRST DEGREE

in violation of: SECTION

§609.185(2) , Minnesota Statutes 1974

Committed on/the or about 29th *day of* October , *19* 74, *at*

LOCATION

City of Minneapolis, Hennepin County, Minnesota,

in the above-named County, Minnesota.

SJIS
27-11-2-025341

MURDER IN THE FIRST DEGREE
§609.185(2)

That on or about the 29th day of October, 1974, within the corporate limits of the City of Minneapolis, Hennepin County, Minnesota, MARSHALL DONALD MURPHY, then and there being, did wilfully, unlawfully, wrongfully, knowingly and feloniously cause the death of a human being, to-wit: Sherrie Cole, while committing or attempting to commit rape or sodomy with force or violence either upon or affecting the said Sherrie Cole or another.

NAMES OF WITNESSES EXAMINED BEFORE THE GRAND JURY:

Dr. Garry Peterson
Lt. James Breen
Mara Widseth
Pam McGee
Jacqueline Johnson
Phyllis Gagnon
Phillip DuBois

DATE
OCTOBER 29, 1981

Signature of Foreperson of the Grand Jury
Freddie Mays-Jones

STATE OF MINNESOTA *COUNTY OF*
HENNEPIN

Clerk's Signature or File Stamp

State of Minnesota

Plaintiff,

vs.

MARSHALL DONALD MURPHY,

Defendant(s)

RETURN OF SERVICE
I hereby Certify and Return that I have served copy of this INDICTMENT upon the Defendant(s) herein named.
Signature of Authorized Service Agent.

Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-827

IN THE

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October Term, 1982

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vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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RESPONDENT'S BRIEF IN OPPOSITION

The Petitioner's Statement of the Case adequately describes the procedural history in the Minnesota courts. The facts are set forth in the opinion of the Minnesota Supreme Court, which is appended to the certiorari petition (App. A) and reported at 324 N.W.2d 340 (Minn. 1982).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE MINNESOTA SUPREME COURT APPLIED SETTLED PRINCIPLES OF FEDERAL CONSTITUTIONAL LAW TO ITS INTERPRETATION OF STATE LAW GOVERNING THE DUTIES OF THE PROBATION OFFICER AND TO ITS FACTUAL FINDING OF DECEPTION BY THE PROBATION OFFICER.

The Respondent had been ordered by a Minnesota court to report to his probation officer as directed and to truthfully answer her questions (App. C-31-33). The Minnesota Supreme Court interpreted the state court's probation order to mean that if the Respondent failed to appear at the probation office as directed, then the Respondent would be in violation of the court order and subject to arrest and detention (App. A-10).

In Minnesota, a probation officer is "an official representative of the [c]ourt" (App. C-33) whose authority is derived exclusively from the court's probation orders. The compulsory processes of the court are made available to probation officers solely for the purpose of keeping a sentencing court advised of an individual's progress while on probation (App. C-33-35). Minnesota law does not contemplate a probation officer using the court's compulsory processes to initiate or substantiate criminal investigations (App. C-31-35).

The Minnesota Supreme Court made two factual findings which control the outcome of this case. First, the probation officer intentionally used the compulsory processes of the court for the purpose of gathering evidence for the police (App. A-3). Second, the probation officer repeatedly told

the Respondent that she was questioning him about the murder only because she was concerned about the Respondent's need for treatment during the remainder of his probation (App. A-3). The Minnesota Supreme Court found that the probation officer made this representation even after the Respondent said that he felt like calling a lawyer (App. A-3-4). The Respondent had been deceived as to the true nature of the compulsory interview (App. A-4).

The controlling constitutional principles in this case were set forth in *Estelle v. Smith*, 451 U.S. 454 (1981); and *Garner v. United States*, 424 U.S. 648 (1976). In light of state law governing the role of a probation officer, the Minnesota Supreme Court correctly applied those settled constitutional principles to this unique fact situation.

II.

THERE IS NO CONFLICT BETWEEN THE MINNESOTA SUPREME COURT'S DECISION AND THE DECISIONS OF OTHER APPELLATE COURTS.

The appellate decisions cited by the Petitioner do not conflict with the decision in this case.

In *United States v. Miller*, 643 F.2d 713 (10th Cir. 1981); *United States v. Holmes*, 594 F.2d 1167 (8th Cir. 1979); and *State v. Roberts*, 544 P.2d 754 (Wash.App. 1976); the defendants' admissions to their probation officers were held to be admissible at trial. In those cases, the probation officers were not deliberately attempting to incriminate the defendants for the purpose of initiating or substantiating a criminal investigation. In the instant case, that was the probation officer's purpose. This factual distinction accounts for the different result in this case (App. A-10). *See also, In Re Richard T.*, 79 Cal.App.3d 382, 391, 144 Cal. Rptr. 856, 861 (1978).

In *Alspach v. State*, 440 N.E.2d 502 (Ind. App. 1982); and *People v. W.*, 24 N.Y.2d 732, 302 N.Y.S.2d 260, 249 N.E.2d 882 (1969); the defendants' admissions to their probation officers were held to be admissible at probation revocation proceedings. This case concerns the admissibility of evidence at a criminal trial. If this case had involved a probation revocation hearing, then the Minnesota Supreme Court may have reached the same result as the Indiana and New York courts (App. A-7-8). There is no conflict between these decisions.

The two other New York cases cited by the Petitioner are trial court decisions. *People v. Parker*, 100 Misc.2d 800, 421 N.Y.S.2d 561 (1979); *People v. Alston*, 79 Misc. 2d 586, 360 N.Y.S.2d 768 (1974). Those decisions appear to conflict with the decision in this case. However, a more recent New York appellate case suppressed a custodial confession made by a defendant to his parole officer even though the defendant had earlier been given *Miranda* warnings. *People v. Alston*, 431 N.Y.S.2d 82 (App.Div. 1980). In reaching its decision, the New York appellate court emphasized the defendant's legal obligation to answer his parole officer's questions and the deceptive nature of the interrogation. The decision by the Minnesota Supreme Court was based on these same factors.

Similarly, in *State v. Fields*, 621 P.2d 651 (Ore.App. 1980), *reconsidered*, 624 P.2d 655 (Ore.App. 1981); the probation officer used his authority in a deceptive way in order to obtain a confession for the police. Like the Minnesota Supreme Court, the Oregon appellate court suppressed the confession.

In summary, appellate courts have uniformly held that where probation officers use the courts' compulsory processes in a deceptive way to obtain confessions for the police, then such confessions will not be admitted at a criminal trial. There is no conflict which requires resolution by this Court.

III.

THE PROBATION OFFICER FAILED TO HONOR THE APPELLANT'S TIMELY ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THEREFORE THIS COURT IS NOT LIKELY TO REACH THE QUESTION PRESENTED.

When the probation officer confronted the Respondent with the information she had received about the murder, the Respondent immediately said that he felt like calling an attorney (App. C-16, 20, 21, 26). The probation officer then told the Respondent that he would have to deal with an attorney outside the probation office because her main concern was the Respondent's need for further treatment (App. C-9, 16, 17).

At the hearing on the Respondent's motion to suppress, the Respondent argued that the request for a lawyer constituted an assertion of the privilege which the probation officer was required to honor (App. B-6). The trial court did not discuss the issue (App. B-6-14).[1] The Minnesota Su-

[1]The trial court only mentioned the Respondent's request for an attorney during its discussion on voluntariness. The trial court said that he was "persuaded by the probation officer's testimony" that the Respondent's request for an attorney was made in the context of a "civil suit" for breach of confidentiality (App. B-13, 14). The trial court's reference to a civil suit was clearly erroneous (App. C-20, 21) and the Minnesota Supreme Court omitted the reference in its statement of the facts (App. A-3).

preme Court stated that it would not decide the issue (App. A-9).

A government official who has the power to compel answers to questions cannot arbitrarily deny an individual's request to consult with a lawyer. *Maness v. Meyers*, 419 U.S. 449 (1975). *See, United States v. Mandujano*, 425 U.S. 564, 581 (1976) (Burger, C.J., plurality). Where a government official attempts to use its compulsory processes to incriminate an individual, a timely request for a lawyer constitutes an assertion of the privilege against self-incrimination. *Fare v. Michael C.*, 442 U.S. 707 (1979). *See, Garner v. United States*, 424 U.S. 648 (1976). Any objection to a question which can reasonably be construed as an attempt to invoke the privilege must be honored. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (can request a lawyer "in any manner"); *Quinn v. United States*, 349 U.S. 155, 162-63 (1955) (can assert the privilege "in any language"); *Emspak v. United States*, 349 U.S. 190 (1955); *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978); *United States v. Goodwin*, 470 F.2d 893 (5th Cir.), *cert. denied*, 411 U.S. 969 (1972); *United States v. Prestigiacomo*, 504 F.Supp. 681 (E.D.N.Y. 1981); *Schwartz v. Secretary of Treasury*, 364 F.Supp. 344 (D.C.D.C. 1973).

In this case, the probation officer was an "official representative of the [c]ourt" (App. C-33) who had the power to compel answers from the Respondent (App. C-32, 34). The probation officer knew those answers would be incriminating in nature (App. A-3). *Compare, Garner v. United States*, 424 U.S. 648 (1976). Prior to answering any questions, the Respondent clearly stated that he felt like calling an attorney (App. A-3). He thereby invoked the privilege against self-incrimination. The Respondent's

assertion of the privilege was ignored by the probation officer and the subsequent confession is inadmissible at trial.

Based on the foregoing, the result reached by the Minnesota Supreme Court was correct regardless of whether the self-incrimination clause is self-executing under the facts of this case. The Respondent asserted the privilege and therefore this Court need not address the question presented.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
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IN THE

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In his Brief in Opposition respondent makes two plausible arguments for denial of certiorari in this case. Both arguments, however, rest on patent misrepresentations of the record before this Court.

First, respondent contends that whether or not the self-incrimination clause of the Fifth Amendment is self-executing, he timely claimed his privilege against self-incrimination by expressing his desire to talk to an attorney (Brief in Opposition at 5-7).

The question whether respondent made a timely claim of his Fifth Amendment privilege was decided by the trial court in the negative. The trial court found as a matter of

fact that respondent's reference to an attorney was made in the context of a civil suit for breach of confidentiality against the counselor who disclosed confidential information to his probation officer and did not, therefore, constitute an assertion of respondent's privilege against self-incrimination (App. B-13-14).

The Minnesota Supreme Court assumed without deciding that the trial court's finding was correct. It accurately summarized the facts as follows: "The [probation officer] apparently opened the meeting by telling [respondent] about the information which she had received from the counselor and then said that she now felt that [respondent] needed treatment. [Respondent] became angry when he learned this. He stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney." (App. A-3.) The Minnesota Supreme Court indicated that it did not need to "decide whether [respondent] in fact claimed [his] privilege [against self-incrimination] in this case because . . . an exception must be made on the facts of this case to the general rule requiring a timely claim of the privilege." (App. A-9.) Thus, the Minnesota Supreme Court left undisturbed the trial court's finding that respondent did not assert his Fifth Amendment privilege against self-incrimination by expressing his desire to talk to an attorney in the manner in which he did.

Accordingly, the question before this Court is whether, as the Minnesota Supreme Court held, respondent's Fifth Amendment privilege was self-executing under the circumstances of this case. Petitioner reaffirms that this question is important, has been wrongly decided by the Minnesota Supreme Court, and is clearly presented by the record herein.

Second, respondent asserts that the cases cited by petitioner in support of the proposition that there is an apparent conflict between the decision of the Minnesota Supreme Court and the decisions of other state and federal appellate courts are distinguishable because, in the present case, respondent's probation officer deceived him regarding her intentions and motives in holding the September 28 interview (Brief in Opposition at 3-4). Even a cursory review of the record before the Court discloses that this assertion is a misrepresentation of the record. Neither the Minnesota Supreme Court nor the trial court ever so much as suggested that respondent's probation officer acted deceptively, with ulterior motives, or in concert with the police. Respondent's assertion that the Minnesota Supreme Court "found" that "the probation officer intentionally used the compulsory processes of the court for the purpose of gathering evidence for the police" (Brief in Opposition at 2), has no basis in fact because the Minnesota Supreme Court made no such "finding" in its opinion.[1]

Because the arguments respondent makes in his Brief in Opposition do not apply to the record before the Court and for the reasons set forth in the Petition, this Court should issue a writ of certiorari to give the important ques-

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[1]Citing *Estelle v. Smith*, 451 U.S. 648 (1976) respondent also contends that the Minnesota Supreme Court applied "settled constitutional principles" to reach the result herein (Brief in Opposition at 3). As the Court was at pains to point out in *Estelle*, however, the facts of that case fell squarely within the Court's holding in *Miranda v. Arizona*, 384 U.S. 486 (1966). As demonstrated in the Petition, the facts of the present case not only fall outside of *Miranda's* holding but they dictate a contrary result under the Court's subsequent interpretation of *Miranda*. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492 (1977).

tion of federal constitutional law presented herein the plenary consideration it deserves.

Respectfully submitted,

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1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTION PRESENTED

Does the Fifth Amendment to the United States Constitution require, in the absence of a *Miranda*-type warning, suppression of a probationer's noncustodial but incriminating admissions to his probation officer where the probationer is required by the conditions of his probation to meet with his probation officer as directed and to be truthful with her and the probation officer has reason to believe that the probationer's answers to her questions are likely to be incriminating?

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Minn. Stat. § 609.343 (1980) 3

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IN THE

Supreme Court of the United States

October Term, 1982

No. 82-827

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App. A) is reported at 324 N.W.2d 340 (Minn. 1982). The opinion of the Hennepin County District Court (App. B) is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court (App. 14-15) was entered on September 21, 1982. The petition for a writ of certiorari was filed on November 9, 1982. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> ". . . Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 609.14 of the Minnesota Statutes of 1980:

> "Subdivision 1. When it appears that the defendant has violated any of the conditions of his probation or has otherwise been guilty of misconduct which warrants the imposing (sic) or execution of sentence, the court may without notice revoke the stay thereof and probation and direct that the defendant be taken into immediate custody.
>
> Subd. 2. The defendant shall thereupon be notified in writing and in such manner as the court directs of the grounds alleged to exist for revocation of the stay of imposition or execution of sentence. If such grounds are brought in issue by the defendant, a summary hearing shall be held thereon at which he is entitled to be heard and to be represented by counsel.
>
> Subd. 3. If any such grounds are found to exist the court may:
>
> (1) If imposition of sentence was previously stayed, again stay sentence or impose sentence and stay the execution thereof, and in either event place the defendant on probation pursuant to section 609.135, or impose sentence and order execution thereof; or

(2) If sentence was previously imposed and execution thereof stayed, continue such stay and place the defendant on probation in accordance with the provisions of section 609.135, or order execution of the sentence previously imposed.

Subd. 4. If none of such grounds are (sic) found to exist, the defendant shall be restored to his liberty under the previous order of the court."

STATEMENT OF THE CASE

On the morning of September 28, 1981, during the course of a meeting with his probation officer, Marshall Donald Murphy (hereinafter "respondent") confessed to the rape and murder of a seventeen-year-old woman. In a pretrial certified appeal of the Hennepin County District Court's order ruling the confession admissible, the Minnesota Supreme Court held, solely on federal constitutional grounds, that the confession could not be used in the State's prosecution of respondent for murder in the first degree (App. A-10). The circumstances leading to respondent's confession were as follows:

On August 19, 1980, respondent pled guilty to the crime of false imprisonment (Minn. Stat. § 609.255 (1980)) in a prosecution for criminal sexual conduct in the second degree (Minn. Stat. § 609.343 (1980)).[1] Following this plea, the Hennepin County District Court sentenced respondent to a stayed prison term of sixteen months and a probation term of three years (App. C-31). The conditions of respondent's probation required him, *inter alia*, to participate in a treatment program for sexual offenders, to report to his

[1]Respondent was originally charged with criminal sexual conduct in the second degree. He pled guilty to false imprisonment, a lesser included offense, pursuant to the terms of a plea negotiation agreement.

probation officer as directed, and to be truthful with her in all matters (App. C-32). The terms of respondent's probation also provided that failure to comply with these conditions "[could] cause [respondent] to be returned to the Court for further hearing or commitment" (App. C-33). On September 22, 1980, the District Court appointed Mara Widseth (hereinafter "Widseth"), a probation officer with the Hennepin County Department of Court Services, to supervise respondent's probation.

Respondent is a twenty-nine-year-old high school graduate (App. C-25, C-29) who attended vocational school and later served in the military (App. C-29). By virtue of previous criminal convictions, he was familiar with the criminal justice system at the time of the confession which is at issue herein (App. C-29). Following his sentencing on the false imprisonment conviction, respondent participated in a treatment program for sexual offenders and met with his probation officer once a month to discuss treatment, employment, and personal relationships (App. C-5-6). The monthly meetings took place in Widseth's office (App. C-6) and were scheduled by respondent at his convenience (App. C-5). Between September 1980 and September 1981, respondent and Widseth met in her office approximately twelve times (App. C-6).

On July 14, 1981, upon learning that respondent was no longer in treatment, Widseth wrote respondent a letter asking him to contact her immediately (App. C-7). Widseth stated that respondent's failure to contact her would result in an immediate request for a warrant (App. C-35). Respondent contacted Widseth by telephone and agreed to meet with her in her office on July 21, 1981 (App. C-8).

During the course of this meeting, respondent told Wid-

seth that he did not want to continue treatment (App. C-14). Widseth acquiesced and told respondent that she would not seek to have his probation revoked on that ground alone because he was employed and seemed to be doing well in other areas (App. C-14). Respondent and Widseth met again in her office on September 11, 1981, without incident (App. C-8, C-14).

On September 22, 1981, Widseth learned from a counselor in respondent's treatment program that during the course of treatment respondent had admitted the commission of a rape and murder in 1974 and had indicated that he was not arrested because of the lack of evidence (App. C-15). After discussing the matter with her supervisor, Widseth decided that she would have to relay the information she had received from respondent's counselor to the police (App. C-16). She then wrote respondent a letter asking him to contact her in order to discuss a treatment plan for the remainder of his probation (App. C-15). The letter contained no threats or promises (App. C-36).

Upon receiving Widseth's letter, respondent contacted her by phone and made an appointment to meet with her in her office on September 28, 1981. Prior to this meeting, neither Widseth nor her supervisor had contacted, or been contacted by, law enforcement authorities concerning the rape and murder to which respondent later confessed (App. C-20).

Widseth began the September 28 meeting by telling respondent the substance of the information she had received from his counselor (App. C-16). She then proceeded to stress the need for further treatment in light of the behavioral relationship between the incident leading to respondent's false imprisonment conviction and the rape and mur-

der to which respondent had confessed during treatment (App. C-9). Upon learning that his counselor had disclosed confidential information to his probation officer, respondent became angry (App. C-9) and stated that "he felt like calling a lawyer" (App. C-21, C-26). Widseth told respondent that "he would have to deal with [that] outside the office" (App. C-16). She then reiterated the need to discuss the behavioral relationship between the incidents leading to the false imprisonment conviction and the 1974 rape and murder, stating that such relationship indicated the need for further treatment (App. C-16).

Respondent denied committing the crime of false imprisonment and stated that at the time of the rape and murder he had been using drugs quite heavily (App. C-9). He also stated that he was no longer using drugs (App. C-9). Widseth "confronted" respondent with his claim of innocence of the false imprisonment charge by reviewing with him a police report and a presentence investigation regarding the offense, as well as specific incidents reported by the victim and respondent's own statements concerning the crime (App. C-17-18). Without prodding by Widseth, respondent then proceeded to talk about the 1974 rape and murder in detail (App. C-18).

At the conclusion of the meeting, Widseth told respondent that she had a duty to relay the information he had given her to the police and encouraged him to turn himself in (App. C-18, C-28). Respondent said he understood that Widseth was obligated to go to the police but noted that unless he confessed to the police "it would just be [Widseth's] word [against his]" (App. C-22). He then asked Widseth for time to think about whether or not to turn himself in (App. C-18). Widseth acquiesced (App. C-18).

Respondent began crying and told Widseth that he had committed the "ultimate sin" (App. C-11). He also told Widseth that she "must really care about him" because she gave him time to think instead of turning him in to the police right away (App. C-18-19, C-21). Respondent took a few minutes to compose himself and left the office (App. C-19).

Throughout the entire course of this meeting the door to Widseth's office was unlocked and respondent was free to leave at any time (App. C-19-20).

On September 30, 1981, respondent called Widseth and told her that he had consulted an attorney and had been advised not to turn himself in (App. C-28). On October 2, 1981, Widseth procured the issuance of an arrest and detention warrant against respondent "for failure . . . actively [to] work on a problem area and to comply with the terms of [treatment]" (App. C-14-15). On October 29, 1981, the Hennepin County Grand Jury returned an indictment charging respondent with murder in the first degree (Minn. Stat. § 609.185(2) (1974)).

At a pretrial hearing held before the Hennepin County District Court respondent moved to suppress his confession on the ground that it was obtained in violation of his Fifth and Fourteenth Amendment rights. The trial court ruled that the confession was admissible against respondent in a prosecution for murder in the first degree despite the probation officer's failure to advise him of his Fifth Amendment rights. The court reasoned that respondent was not constitutionally entitled to warnings at the time of questioning because he was neither "in custody" nor "otherwise deprived of his freedom of action in any significant way" (App. B-11-12). The court further reasoned that respon-

dent's statements were neither "compelled" in the manner proscribed by the Fifth Amendment nor "involuntary" within the meaning of the Due Process Clause (App. B-13-14). In addition, the trial court found that respondent's reference to an attorney was made in the context of a civil suit for breach of confidentiality against the counselor who had disclosed confidential information to his probation officer and did not, therefore, constitute an assertion of respondent's privilege against self-incrimination (App. B-13-14).

On appeal the Minnesota Supreme Court reversed the order of the trial court and remanded the matter for further proceedings, holding as follows:

> Because of the compulsory nature of the meeting, because [respondent] was under court order to respond truthfully to his [probation officer's] questions, and because the [probation officer] had substantial reason to believe that [respondent's] answers were likely to be incriminating we conclude that, as a matter of federal constitutional law, any failure on [respondent's] part to claim the [Fifth Amendment] privilege [against compelled self-incrimination] when he was questioned does not bar his later reliance on the privilege in seeking supression of his confession. Stated differently, we conclude that as a matter of due process, the [probation officer] should have warned [respondent] of his privilege against compelled self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of [respondent's] confession at his trial."

324 N.W.2d at 344 (Minn. 1982). Following the judgment of the Minnesota Supreme Court suppressing respondent's

confession, the Hennepin County District Court dismissed respondent's indictment and stayed the dismissal pending appeal to this Court (App. D-3-4).

SUMMARY OF ARGUMENT

The question presented herein is whether a probationer who makes incriminating admissions to his probation officer during the course of a noncustodial interview in lieu of invoking his Fifth Amendment privilege against compelled self-incrimination may subsequently invoke the privilege to bar use of his incriminating admissions in a criminal prosecution for murder in the first degree.

In holding that a probationer who is not in custody may so invoke the privilege, the Minnesota Supreme Court has in effect ruled that probationers are constitutionally entitled to be warned of their Fifth Amendment privilege prior to a noncustodial interview with their probation officers and that failure on the part of the probation officers so to warn precludes use of the probationer's voluntary but incriminating admissions in a subsequent criminal prosecution. Thus, the decision of the Minnesota Supreme Court departs significantly from the leading decisions of this Court defining the scope of the government's obligation under the Fifth Amendment.[3]

The Minnesota Supreme Court's holding is premised on two critical misconceptions which compel reversal: First, that a probationer's noncustodial interview with his probation officer, like police custodial interrogation, contains inherently coercive pressures which work to undermine the

[3] *United States v. Washington*, 431 U.S. 181 (1977); *Garner v. United States*, 424 U.S. 648 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

probationer's will to resist and his ability to make a free and rational choice; and, second, that the conditions of probation and the probation officer's belief that the probationer's answers to her questions are likely to be incriminating, without more, deprive probationers of the "free choice to admit, to deny, or to refuse to answer." *Garner v. United States*, 424 U.S. 648, 657 (1976) (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

For reasons more fully set forth below, petitioner submits that the constitution does not require that a probationer be given any warnings, least of all full *Miranda* warnings, prior to a noncustodial interview with his probation officer. Further, petitioner submits that a probationer who makes incriminating admissions to his probation officer during the course of a noncustodial interview instead of claiming his Fifth Amendment privilege is precluded from subsequently invoking the privilege as a bar to the use of his incriminating admissions in a criminal prosecution.

1. A probation officer's failure to advise a probationer who is not in custody of his privilege against self-incrimination does not impermissibly compel the probationer's incriminating admissions in violation of the Fifth Amendment. The Self-Incrimination Clause of the Fifth Amendment provides only that a person shall not be *compelled* to give evidence against himself. In the absence of compulsion, therefore, the Self-Incrimination Clause proscribes neither self-incrimination, nor the questioning of a person suspected of a crime, nor the use in evidence of voluntary admissions made by a person suspected of a crime. Thus, the fatal flaw in the Minnesota Supreme Court's application of a warnings requirement to probationers who are not in custody lies in the court's failure to recognize that the privi-

lege against self-incrimination comes into play only when there is compulsion of testimony.

Moreover, this Court has carefully limited the requirement that interrogation be preceded by a full recitation of rights to the process of incommunicado custodial police interrogation. The salient features of incommunicado police interrogation, however, differ markedly in their potential for overbearing the will of an individual from the characteristics of a probationer's noncustodial interview with his probation officer. The latter takes place in familiar surroundings at a time when the probationer is neither under formal arrest nor deprived of his freedom of action in any significant way. The inherent pressures upon a person taken into custody and the opportunities for the use of physical force, threats, or intimidation to overcome the probationer's will to resist are thus nonexistent in the probationary setting. Therefore, to extend the requirement of warnings in the context of in-custody interrogation to noncustodial questioning by a probation officer would be an "extravagant expansion never remotely contemplated by this Court in *Miranda*[.]" *United States v. Mandujano*, 425 U.S. 564, 580 (1976). Indeed, the Court explicitly rejected such an extension in *Miranda* by stating that police "inquiry of persons not under restraint" or "other general questioning of citizens in the fact-finding process is not affected by [this] holding." *Miranda v. Arizona, supra*, 384 U.S. at 477.

Furthermore, if noncustodial questioning of a probationer by his probation officer is to be equated with incommunicado police custodial interrogation, as the Minnesota Supreme Court implicitly has done, it is difficult to see why such questioning is more coercive when the probation officer suspects the probationer of criminal activity than it is

otherwise. Indeed, the holding of the Court in *Beckwith v. United States*, 425 U.S. 341 (1976), established beyond any doubt that whether a person has been compelled within the meaning of the Fifth Amendment has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted." 425 U.S. at 346 (quoting *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970)). Rather, the presence or absence of impermissible compulsion turns upon the question whether, in the circumstances, it is likely that an individual's free will was overborne. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

A warnings requirement such as that imposed by the Minnesota Supreme Court, hinging on the suspicions of the probation officer at the time of questioning, fails to recognize *Miranda's* concern with the coercive effect of custodial interrogation from the point of view of the person being questioned. *See United States v. Hall*, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). Moreover, it rests upon the self-contradictory thesis that noncustodial questioning by a probation officer is constitutionally coercive only of some probationers, who can be identified and distinguished from other probationers solely on the basis of factors having nothing to do with coercion. Fifth Amendment warnings, therefore, should not be required to precede noncustodial questioning of a probationer simply because the probation officer has reason to believe that the probationer's answers to her questions are likely to result in incriminating admissions. *See United States v. Washington*, 431 U.S. 181, 189 (1977); *United States v. Mandujano, supra*, 425 U.S. at 574.

2. A probationer who makes incriminating admissions

to his probation officer instead of claiming his Fifth Amendment privilege against compulsory self-incrimination may not subsequently invoke the privilege as a bar to the use of his incriminating admissions in a criminal prosecution. A probationer's noncustodial interview with his probation officer is analogous to the giving of testimony in a civil proceeding, before a grand jury, or in response to an administrative summons. It is clear that when such testimony is given without a contemporaneous claim of privilege, it has not been "compelled" in the manner proscribed by the Fifth Amendment and it may therefore be used against the witness in a subsequent criminal prosecution. *See United States v. Kordel*, 397 U.S. 1, 10 (1970); *United States v. Monia*, 317 U.S. 424, 427 (1943); *United States v. Murdock*, 284 U.S. 141, 148 (1931).

A probationer who is required to meet with his probation officer as directed and to be truthful with her is subject to no greater compulsion during the course of a noncustodial interview with his probation officer than that experienced by a grand jury witness or a witness in an ordinary civil proceeding. Most importantly, a probationer may not constitutionally be punished for invoking his Fifth Amendment privilege against self-incrimination in lieu of answering questions which, if answered truthfully, would result in incriminating admissions. *See Spevack v. Klein*, 385 U.S. 511, 515 (1967), *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Thus, a valid claim of privilege would be available to a probationer as a complete defense to probation revocation. The protection accorded a probationer's claim of privilege at a revocation hearing is sufficient under *Garner* to preserve the probationer's "free choice to admit, to deny, or to refuse to answer." *Garner v. United States*,

supra, 424 U.S. at 657 (quoting *Lisenba v. California*, *supra*, 314 U.S. at 241).

Thus, probationers who are not in custody are not subjected to any undue pressures designed to coerce them to forego a valid claim of privilege simply by virtue of their probationary status. Therefore, since the Fifth Amendment confers an immunity from prosecutorial use only upon disclosures made as a result of testimonial compulsion, no constitutional basis exists for barring prosecutorial use of a probationer's non-custodial admissions to his probation officer absent a timely claim of privilege.

3. The Due Process Clause of the Fourteenth Amendment requires neither the routine administration of warnings in the probationary setting nor the suppression of respondent's incriminating admissions to his probation officer. The critical inquiry under the Due Process Clause is whether "the behavior of law enforcement officials was such as to overbear [an individual's] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond*, *supra*, 365 U.S. at 544. In making this determination, the Court has assessed the "totality of all the surrounding circumstances" in a particular case, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), and has considered a variety of criteria including the use of physical force, *Brown v. Mississippi*, 297 U.S. 278 (1936); the use of deceptive promises and practices, *Spano v. New York*, 360 U.S. 315 (1959); the use of threats, *Lynumn v. State of Illinois*, 372 U.S. 528 (1963); the length of detention, *Chambers v. Florida*, 309 U.S. 227 (1940); and the prolonged nature of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Although the administration of warnings of constitutional rights is a relevant criterion in assessing

the voluntariness of an individual's incriminating disclosures, it is not, in and of itself, determinative. *See Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. A determination of voluntariness turns, not on the presence or absence of a single controlling criterion, but on a careful scrutiny of all the surrounding circumstances. *Id.*

A careful scrutiny of the circumstances surrounding respondent's incriminating admissions to his probation officer reveals that respondent's admissions were the product of his free and rational choice. None of the traditional indicia of involuntariness is present in this case. Respondent is a twenty-nine-year-old high school graduate who, by virtue of prior criminal convictions, was thoroughly familiar with the criminal justice system at the time of his incriminating admissions. He was interviewed in surroundings that had been familiar to him for at least twelve months and was subjected to no menacing interrogation procedures, overbearing tactics of psychological persuasion, physical coercion, lengthy incommunicado detention, threats or promises. Indeed, the interview was conducted with a high degree of civility and restraint. Moreover, respondent was neither under formal arrest nor deprived of his freedom of action in any way. Rather, he was free to leave at any time and was in fact allowed to leave at the conclusion of the interview even though he had confessed to the rape and murder of a seventeen-year-old woman. In these circumstances the probation officer's failure to advise respondent of his Fifth Amendment rights can hardly be said to have been unfair, let alone to have violated "fundamental fairness" or to be "shocking to the universal sense of justice." *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).

In finding respondent's confession to have been obtained in violation of due process, the Minnesota Supreme Court disregarded the traditional criteria of involuntariness and relied instead on factors which do not even approximate the circumstances this Court has recognized as rendering confessions involuntary. Thus, because under the standards developed by this Court there is no basis for concluding that respondent's incriminating admissions were obtained in violation of due process, such admissions may properly be used in the State's prosecution of respondent for murder in the first degree.

ARGUMENT

I.

A PROBATION OFFICER'S FAILURE TO ADVISE A PROBATIONER OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION PRIOR TO A NONCUSTODIAL INTERVIEW DOES NOT IMPERMISSIBLY COMPEL THE PROBATIONER'S INCRIMINATING ADMISSIONS IN VIOLATION OF THE FIFTH AMENDMENT

The principal issue in this case is whether incriminating admissions made by respondent to his probation officer during the course of a noncustodial interview are rendered inadmissible by the probation officer's failure to advise respondent of his Fifth Amendment privilege against compelled self-incrimination. In considering this issue, the trial court ruled that respondent's incriminating disclosures were admissible in evidence despite the probation officer's failure to advise him of his rights. The trial court reasoned that respondent was not constitutionally entitled to Fifth

Amendment warnings at the time of questioning because he was neither "in custody" nor "otherwise deprived of his freedom of action in any significant way" (App. B-11-12). The court further reasoned that respondent's admissions were neither "compelled" in the manner proscribed by the Fifth Amendment nor "involuntary" within the meaning of the Due Process Clause (App. B-12-14).

On appeal, the Minnesota Supreme Court reversed the ruling of the trial court, holding that the probation officer's failure to advise respondent of his Fifth Amendment rights barred use of his incriminating disclosures at trial and, further, that respondent's failure to make a timely claim of privilege did not preclude him from subsequently invoking the privilege as a bar to the use of his admissions at trial. While the Minnesota Supreme Court did not expressly articulate the chain of reasoning leading to its decision or the constitutional basis upon which its holding rests, it appears that the court based its holding both on the Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Further, it appears that the court's decision rests, to some extent, on the perception that it is somehow unfair to require a probationer to meet with his probation officer and to be truthful with her when the probation officer has reason to believe that the probationer's answers to her questions are likely to result in incriminating admissions. The remedy prescribed by the Minnesota Supreme Court for this perceived impropriety is the giving of Fifth Amendment warnings.

Petitioner submits that the routine administration of Fifth Amendment warnings prior to a probation officer's noncustodial interview of a probationer is neither constitu-

tionally required nor desirable from the standpoint of the policies enunciated by this Court regarding the function of probation. *See, e.g., Gagnon v. Scarpelli,* 411 U.S. 778, 783 (1973); *Morrisey v. Brewer,* 408 U.S. 471, 477 (1972). The administration of warnings is simply a "prophylactic standard" designed to safeguard the privilege against self-incrimination in settings such as incommunicado custodial interrogation where it is deemed to be singularly threatened. *Michigan v. Tucker,* 417 U.S. 433, 446 (1974). As such, the routine administration of warnings has no place in the probationary setting.

A. THE REQUIREMENT THAT ANY WARNING OF RIGHTS BE GIVEN APPLIES ONLY TO CUSTODIAL INTERROGATION

The Self-Incrimination Clause of the Fifth Amendment speaks of compulsion. In *Michigan v. Tucker, supra,* 417 U.S. at 448, this Court reaffirmed the principle that "[c]ases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself." (Emphasis in original.) As a general rule, the question of coercion is one of fact. Thus, prior to *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court would review a claim that law enforcement officials coerced incriminating statements from a person in custody by examining the particular circumstances of the interrogation in order to determine whether the process was so coercive as to render involuntary any statement made during the course of questioning.[3] In *Miranda,* how-

[3] *See, e.g., Haynes v. Washington,* 373 U.S. 503 (1963); *Payne v. Arkansas,* 356 U.S. 560 (1958); *White v. Texas,* 310 U.S. 530 (1940); *Chambers v. Florida,* 309 U.S. 227 (1940); *Brown v. Mississippi,* 297 U.S. 278 (1936).

ever, the Court announced a prophylactic rule that did not depend upon a finding of actual involuntariness. Under this rule, police officers are required to give adequate warnings of the constitutional right to remain silent and to consult with a lawyer prior to any custodial questioning of a criminal suspect. Absent such warnings, statements made in response to custodial questioning are inadmissible at a subsequent criminal trial.

The *Miranda* Court predicated its holding upon the conclusion that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. The Court based its conclusion upon an examination of police practices that were then widely in use. It noted that under these practices a suspect "was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures" designed "to subjugate the individual to the will of his examiner." 384 U.S. at 457. Referring to various police manuals and texts that set forth suggested interrogation techniques, the Court further noted that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. The Court stressed that custodial interrogation is based, not on physical brutality, but on "relentless questioning" in an oppressive police-dominated atmosphere and on "deceptive strategems" designed to undermine the will of the subject to resist. 384 U.S. at 455. It concluded that, under these circumstances, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455.

In *Miranda*, the Court defined the term "custodial interrogation" clearly and unambiguously to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Although the Court has subsequently indicated that "custodial interrogations" may occur outside of a police station, *see Orozco v. Texas*, 394 U.S. 324, 327 (1969), it has also clearly established that warnings are required only when the person being interrogated is under formal arrest or otherwise deprived of his freedom in any significant way. *See Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Orozco v. Texas, supra; Mathis v. United States*, 391 U.S. 1, 4-5 (1968).

None of the considerations that led the Court in *Miranda* to require warnings of constitutional rights prior to custodial interrogation requires the imposition of a similar requirement in the probationary setting. As the facts of this case demonstrate, the typical interview of a probationer by his probation officer is not held under "custodial conditions." Therefore, the administration of warnings designed to safeguard the privilege against self-incrimination during custodial police interrogation is not justified in the probationary setting.

Here, respondent was neither under formal arrest nor deprived of his freedom of action in any way. Throughout the course of the entire interview the door to his probation officer's office was unlocked and respondent was free to leave at any time. He was in fact allowed to leave at the conclusion of the interview even though he had confessed to the rape and murder of a seventeen-year-old woman. "Such a noncustodial situation is not converted to one in

which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' " *Oregon v. Mathiason, supra,* 429 U.S. at 495.

Similarly, respondent's belief that he was not free to leave does not establish the atmosphere of coercion which the *Miranda* Court found to be typical of custodial situations and does not, therefore, render respondent "in custody." As Judge Friendly observed in *United States v. Hall,* 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970), "[t]he [*Miranda*] Court could scarcely have intended the issue whether [a] person being interrogated ha[s] 'been taken into custody or otherwise deprived of his liberty in any significant way' to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect . . . and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceives his situation would require a prescience neither the police nor anyone else possesses * * * The test [for determining custody] must thus be an objective one."

B. A PROBATION OFFICER'S NONCUSTODIAL INTERVIEW OF A PROBATIONER IS NOT SO INHERENTLY COERCIVE AS TO REQUIRE THE GIVING OF WARNINGS APPROPRIATE TO CUSTODIAL INTERROGATION

In the absence of a custodial situation, the routine administration of Fifth Amendment warnings in the probationary setting would be appropriate only if the manner in which a probation officer's interview of a probationer is typically conducted entails a high degree of coercion, as was found to be the case with incommunicado police interrogation in *Miranda*. The police interrogation environment that formed the basis for the presumption of coercion in *Miranda*, however, contrasts sharply with the nature of a probationer's noncustodial interview with his probation officer. "*Miranda* addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards." *United States v. Mandujano*, 425 U.S. 564, 579 (1976). There is nothing in the typical interview of a probationer, or in the particular interview in this case, that even approximates the environment which formed the basis of the Court's holding in *Miranda*.

By contrast to the unfamiliar setting in which police interrogation occurs, respondent's interview with his probation officer took place in surroundings that had been familiar to him for at least twelve months. The interview was brief and was held at a time of respondent's choice following an appointment made by him in advance. Moreover, unlike the relentless incommunicado questioning recommended by the police manuals in *Miranda*, respondent's meeting with his probation officer was conducted in a con-

genial manner which brought respondent to tears (App. C-11) and to the realization that his probation officer "must really care about him" (App. C-19).

The fact that respondent may have been under "heavy psychological pressure" to answer his probation officer's questions (App. A-8) does not establish the atmosphere of coercion upon which *Miranda* rests. Nor does the fact that respondent may have believed that he was obligated to cooperate with his probation officer render his statements involuntary unless the probation officer, by word or deed, caused respondent's misapprehension. The compulsion that renders a noncustodial interview coercive must come from the government agent conducting the interrogation, not from the inner thoughts or feelings of the interrogee. Indeed, if that were not the case, every instance of questioning by a probation officer in which a probationer makes incriminating admissions would be deemed coercive in the absence of warnings.

Similarly, the probation officer's letter requesting respondent to meet with her cannot be said to have placed respondent in "custody" or to have rendered the interview inherently coercive. This letter is analogous to a subpoena to testify before a grand jury or in a civil proceeding. Such subpoenas have generally been held not to place a witness in "custody." *See, e.g., United States v. Binder,* 453 F.2d 805, 809 (2d Cir. 1971), *cert. denied,* 407 U.S. 920 (1972); *Gollaher v. United States,* 419 F.2d 520, 524 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969). The recipient of a subpoena has an opportunity in advance of questioning to consult with counsel and decide to what extent, if at all, he will respond to questioning. In addition, he can refuse compliance and subsequently contest the legality of

the subpoena in a hearing to show cause. *See United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). And, after he has appeared, he is free to resume his daily activities. *See United States v. Calandra*, 414 U.S. 338, 343 (1974).

Similarly, respondent, after receiving his probation officer's letter requesting him to meet with her, had the opportunity to seek the advice of counsel, to decide whether or not to respond to questioning, and to contest the legality of his probation officer's request if he was subsequently subjected to revocation proceedings for his failure to comply. And, at the conclusion of the interview, he was free to leave and to resume his daily activities. Respondent, therefore, was no more placed in "custody" or coerced by his probation officer's request that he meet with her than is the recipient of a grand jury subpoena.

Finally, the imposition of a warnings requirement in the probationary setting fails to recognize the difference in function between probation and custodial police interrogation. The essence of probation is the suspension of the imposition or the execution of sentence on the condition that the probationer abide by certain rules or "conditions" during the term of the sentence.[4] A. Smith & L. Berlin, *Introduction to Probation and Parole* 3 (2d Ed. 1979). The assumption underlying probation is that a period of guidance and supervision is useful to help probationers avoid further criminal activity and reintegrate into society as constructive

[4]Typically, a probationer is subject to two types of conditions: those which proscribe conduct prohibited to the ordinary citizen, such as the commission of a substantive criminal offense, and those which regulate conduct in areas in which the ordinary citizen is free to act. The latter are called technical conditions and typically include the duty to report to the probation officer as directed and the duty to be truthful with her in all matters. *See* Note, *Parole: A Critique of its Legal Foundations*, 38 N.Y. U.L. Rev. 702, 720 (1963).

individuals. *See Morrisey v. Brewer*, 408 U.S. 471, 477 (1972). The success of probation depends, in large measure, on the probation officer's ability to secure personal information from the probationer and to compel his appearance at regularly scheduled meetings. *See* Newman, *Concepts of Treatment in Probation and Parole Supervision*, 25 Fed. Prob. 11 (March 1961); Note, *Observations on the Administration of Parole*, 79 Yale L. J. 698, 699-700 (1970). The Minnesota Supreme Court's warnings requirement seriously undermines the ability of the probation officer effectively to supervise the probationer and renders her role in the criminal justice system all but meaningless. Moreover, the court's warnings requirement contributes nothing to the protection of probationers against compulsion because probationers are already fully protected by the Fifth Amendment guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

In addition, the requirement that Fifth Amendment warnings precede noncustodial questioning has dramatic adverse consequences on questioning by other governmental officials in the pursuit of their statutory duties. Carried to its logical conclusion, the decision of the Minnesota Supreme Court requires suppression of all noncustodial admissions made to any government agent in the absence of Fifth Amendment warnings. This requirement places an intolerable burden on the administration of justice in general and transmutes the policy of the Fifth Amendment against compulsion into a general policy against incriminating admissions.

C. QUESTIONING BY A PROBATION OFFICER IS NO MORE COERCIVE WHEN THE PROBATION OFFICER HAS REASON TO BELIEVE THAT THE PROBATIONER'S ANSWERS TO HER QUESTIONS ARE LIKELY TO RESULT IN INCRIMINATING ADMISSIONS THAN IT IS OTHERWISE

The holding of the Minnesota Supreme Court is premised, at least in part, on the proposition that the probation officer's belief that respondent's answers to her questions were likely to be self-incriminating rendered his admissions "compelled" within the meaning of the Fifth Amendment. The proposition on which the court's holding is premised ignores the fact that "since at least 1807 . . . all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion," *Hoffa v. United States*, 385 U.S. 293, 303-304 (1966), and that whether a person has been compelled within the meaning of the Fifth Amendment has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted." *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) (quoted in *Beckwith v. United States*, 425 U.S. 341, 346 (1976)).

Petitioner submits that a probationer's incriminating admissions are not more likely to be compelled merely because the probation officer has reason to believe that the probationer's responses to her questions are likely to be incriminating. No authority supports the proposition that the probation officer's suspicions or her intentions with respect to the probationer have any constitutionally significant bearing on the question whether the probationer was compelled to incriminate himself within the meaning of the Fifth Amendment. Indeed, the holding of the Court in

Beckwith v. United States, supra, established unequivocally that whether a person has been compelled within the meaning of the Fifth Amendment has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted." *United States v. Caiello, supra* (quoted in *Beckwith v. United States, supra,* 425 U.S. at 346). *See also Oregon v. Mathiason, supra; Orozco v. Texas, supra; Mathis v. United States, supra.*

Even in the *Miranda* context of custodial interrogation the suspicions of law enforcement officials are irrelevant in defining the right to warnings. There, the presumption of inherent coerciveness applies regardless of whether, at the time of questioning, the police have any basis for suspecting the person being questioned of a crime or any intent to prefer charges against him. As Judge Friendly noted in *United States v. Hall, supra,* 421 F.2d at 544, "a standard [for determining 'custody'] hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the 'atmosphere' from the point of view of the person being questioned * * * Clearly the Court [in *Miranda*] meant that *something* more than official interrogation must be shown. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogations of persons who later become criminal defendants stems from that very source." (Emphasis in original.) *See also Lowe v. United States,* 407 F.2d 1391 (9th Cir. 1969); *United States v. Squeri,* 398 F.2d 785, 790 n.1 (2d Cir. 1968).

To be sure, a probationer suspected of involvement in criminal activity faces a greater likelihood that he will be asked questions calling for responses that may be incriminating. But that fact alone, unaccompanied by any action or

procedure that treats him differently from other probationers who are not suspected of a crime, does not render the interrogation coercive or the probationer's incriminating statements compelled in violation of the Fifth Amendment. A probationer suspected of involvement in criminal activity may, like any other probationer, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other probationer who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . .'" *Michigan v. Tucker, supra,* 417 U.S. at 439.

Similarly, the mere fact that respondent might have not cooperated with his probation officer had he known that her suspicions were focused upon him fails to establish as a matter of law that respondent was coerced into making incriminating admissions in violation of the Fifth Amendment. The probation officer's conduct in this case was anything but coercive. She acted entirely within the scope of her duty to supervise and rehabilitate respondent, in an effort to establish the behavioral relationship between the sex crime for which respondent was placed on probation and the rape and murder to which he confessed during treatment. Her questions were aimed at determining the need for further treatment and not at eliciting incriminating responses from respondent. It was therefore entirely proper for her to question respondent about the 1974 rape and murder in the manner in which she did. Respondent, of course, was free to interpose his Fifth Amendment privilege against self-incrimination at every stage of the interview.

The Minnesota Supreme Court appears to have relied on *Roberts v. United States*, 445 U.S. 552, 559 (1980),[5] for the proposition that Fifth Amendment warnings are required whenever a probation officer is on notice that the questions she plans to ask are likely to result, if answered, in incriminating admissions.[6] The court's reliance on *Roberts* was misplaced. First, the Minnesota Supreme Court misconstrued *Roberts* by turning a qualifying clause into the statement of an affirmative duty, thereby formulating a rule of law never before enunciated by this Court. *Roberts* notwithstanding, however, the clear holding in *Beckwith v. United States, supra*, and *Oregon v. Mathiason, supra*, established beyond peradventure that whether adherence to the warnings requirement of *Miranda* is constitutionally required is determined by the custodial nature of the surroundings and not by the "focus" of the government's investigation or the strength of the government's suspicions at the time of questioning.

The view expressed by Mr. Justice Brennan in his concurring opinions in *Roberts v. United States, supra*, 445 U.S. at 559, and *United States v. Mandujano, supra*, 425 U.S. at 584 —that a knowing and intelligent waiver of the privilege against self-incrimination is required whenever the government is on notice that the questions it plans to ask are likely to result in incriminating admissions— appears to be based upon the notion that a knowing and intelligent waiver (and, therefore, a warning) is necessary prin-

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[5]Mr. Justice Powell, speaking for the majority in *Roberts*, stated that "[a]t least where the government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege [against compelled self-incrimination] may not be relied upon unless it is invoked in a timely fashion." 445 U.S. at 559.

[6]There is also some support for this view in *dicta* in *Garner v. United States, supra*, 424 U.S. at 655.

cipally "to enforce the guarantee of an adversary system" of which "the Fifth Amendment is the essential mainstay." *United States v. Mandujano, supra,* 425 U.S. at 588. This justification for imposing a warnings requirement in a non-custodial setting, however, disregards the fact that the relevant inquiry under the Self-Incrimination Clause is whether there is "genuine compulsion of testimony," *Michigan v. Tucker, supra,* 417 U.S. at 440. The adversary system is not imperiled, and the Fifth Amendment is not violated, unless the government "by *coercion* prove[s] its charge against an accused out of his own mouth." *Rogers v. Richmond,* 365 U.S. 534, 541 (1961) (emphasis added). "The [Fifth Amendment] does not prohibit every element which influences a criminal suspect to make incriminating admissions . . . The constitutional guarantee is only that [a person] be not *compelled* to give self-incriminating testimony. [And] [t]he test is whether, considering the totality of the circumstances, the free will of [that person] was overborne." *United States v. Washington,* 431 U.S. 181, 187-88 (1977) (emphasis in original, citations omitted). In the absence of an officially coerced self-accusation, therefore, an incident that eases the prosecution's burden under our adversary system does not make the system unconstitutionally inquisitorial in violation of the Fifth Amendment.

Miranda clearly established that the heart of the matter is compulsion. That case presents the only circumstance in which this Court has ever held that a knowing and intelligent waiver of the privilege against self-incrimination is a prerequisite to the initiation of questioning by law enforcement officials. As discussed above, the Court's holding in *Miranda* was predicated on the conclusion that compulsion is "inherent in custodial surroundings." 384 U.S. at

458. That conclusion, in turn, "was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation,' " *Beckwith v. United States, supra,* 425 U.S. at 346. Thus, because a probation officer's interview of a probationer who is not in custody is not inherently coercive there is no need to impose on the probationary setting a warnings requirement appropriate to custodial interrogations or to other similarly inherently coercive situations.

This does not mean that probationers will be left unprotected from any coercive practices that may be discovered in particular cases. A probation officer's noncustodial interview of a probationer, like any other noncustodial interrogation, "might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear [a probationer's] will to resist and bring about confessions not freely self-determined . . . .' *Rogers v. Richmond,* 365 U.S. 534, 544 (1961)." *Beckwith v. United States, supra,* 425 U.S. at 347-48. In such cases, it will be the duty of a reviewing court, including this Court, to examine the entire record and make an independent determination of whether the questioning was in fact unconstitutionally coercive. *Id.* The presence or absence of Fifth Amendment warnings in such cases, however, while relevant evidence going to the ultimate issue, would not by itself be determinative of whether a probationer's incriminating admissions were coerced in violation of the Fifth Amendment. *Id.; Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973).

II.

A PROBATIONER WHO MAKES NONCUSTODIAL INCRIMINATING ADMISSIONS TO HIS PROBATION OFFICER INSTEAD OF CLAIMING HIS FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION MAY NOT SUBSEQUENTLY INVOKE THE PRIVILEGE AS A BAR TO THE USE OF HIS INCRIMINATING ADMISSIONS IN A SUBSEQUENT CRIMINAL PROSECUTION.

A. THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION IS NOT SELF-EXECUTING: IT MUST BE CLAIMED OR IT IS WAIVED.

It is now well established that when an individual who is called to testify (by subpoena, for example) makes incriminating disclosures instead of claiming his Fifth Amendment privilege, the government has not "compelled" him to incriminate himself and his testimony may be used against him in a subsequent criminal prosecution. This rule applies to testimony given in a civil proceeding, *United States v. Kordel*, 397 U.S. 1 (1970), before a grand jury, *see United States v. Monia*, 317 U.S. 424, 427 (1943), or in response to an administrative summons, *see United States v. Murdock*, 284 U.S. 141, 148 (1931). It also applies to incriminating disclosures made by a taxpayer on his tax returns. *Garner v. United States, supra*, 424 U.S. at 656-57.

Some of the earlier decisions articulating and applying this rule explain it as being grounded in a theory of implied waiver. *See, e.g., United States v. Murdock, supra*, 284 U.S. at 148. Later decisions have correctly pointed out, however, that this rule "reflect[s] an appropriate ac-

commodation between the Fifth Amendment privilege and the . . . principle that governments have the right to everyone's testimony." *Garner v. United States, supra,* 424 U.S. at 655. The Fifth Amendment speaks of compulsion. "It does not preclude a witness from testifying voluntarily in matters which may incriminate him." *United States v. Monia, supra,* 317 U.S. at 427. Nor does it "forbid the asking of criminative questions." *Id.* at 433. Therefore, if a witness desires the protection of the privilege he must claim it or his testimony will not be deemed to have been compelled within the meaning of the Fifth Amendment. *Id.* at 424.

The requirement of express assertion of the privilege pertains even though a witness in a civil proceeding or before a grand jury is ordinarily subject to some compulsion to testify: he often will have been summoned by legal process to appear and to give testimony; he takes an oath that he will tell the truth; and the judge may inform him, if necessary, that he has a duty as a citizen to provide evidence and may not refuse to do so on mere whim. But the mild coercion to which any witness is thereby subjected does not, under decisions of this Court, constitute a basis for subsequent "retroactive" invocation of the Fifth Amendment privilege.

Accordingly, more recent cases involving the question whether a particular witness's testimony may be used against him in a subsequent criminal proceeding have focused upon whether the witness, when testifying, was subjected to a more compelling form of testimonial coercion than that to which a witness is ordinarily subject. Where such coercion has been found, the Court has concluded that the testimony thus compelled, even though given without a contempor-

aneous claim of privilege, is immune from subsequent prosecutorial use against the witness. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967). In the absence of some special or unusual compulsion to speak, however, the prosecution's right to use a witness's previous statement has been recognized. *See Garner v. United States, supra; United States v. Kordel, supra.*

"[T]he general rule that the privilege must be claimed" is subject to generic exception only in those "narrowly defined situations" characterized by some factor that has been "held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.' " *Garner v. United States, supra*, 424 U.S. at 655-57 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)). One such situation involves persons in police custody who make statements during incommunicado interrogation without advise and waiver of rights. *Miranda v. Arizona, supra.* In carving an exception to the general rule that the privilege against self-incrimination must be claimed and in adopting the "extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege," the *Miranda* Court was "impelled" by the presumption that "without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent." *See Garner v. United States, supra*, 424 U.S. at 657. Nothing in this case, however, suggests the need for a similar presumption. As we have already indicated, a probation officer's noncustodial interview of a probationer differs markedly from incommunicado police interrogation in its potential for overbearing the will of the probationer. Custodial interrogation entails risks of coercion such as the

use of "third degree" tactics or "deceptive stratagems" designed to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights," *Miranda v. Arizona, supra,* 384 U.S. at 455. Since these risks are nonexistent in the probationary setting, it hardly seems appropriate to depart in this case from the long-standing rule that a witness must claim the privilege against self-incrimination or lose its protection.

The second "narrowly defined situation" in which use immunity may attach to disclosures made without a contemporaneous claim of privilege involves individuals who, when called to testify in proceedings inquiring into suspected illegalities, are subjected to the imposition of an official penalty or sanction designed to coerce them to forego a valid claim of privilege. *See Lefkowitz v. Cunningham,* 431 U.S. 801 (1977); *Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Lefkowitz v. Turley, supra; Gardner v. Broderick,* 392 U.S. 273 (1968); *Garrity v. New Jersey, supra; Spevack v. Klein, supra.* In all these cases, the individuals called for questioning were directly and explicitly threatened with substantial punitive action for a concededly valid invocation of their Fifth Amendment privilege or for refusal to waive immunity from prosecutorial use of their testimony. These individuals were thus given a choice between self-incrimination and exposure to penalties which made assertion of the Fifth Amendment privilege "costly." *Spevack v. Klein, supra,* 385 U.S. at 515. The Court held this choice to be inherently coercive noting that, like the interrogation practices in *Miranda,* it was "likely to exert such pressures upon an individual as to disable him from making a free and rational choice." *Garrity v. New Jersey, supra,* 385 U.S. at 497.

Nothing remotely similar confronts a probationer during the course of questioning by his probation officer. As the facts of this case demonstrate, a probationer is faced with no threat, express or implied, of a penalty for asserting his Fifth Amendment privilege. Nor is he subjected to other undue pressures designed to coerce him to forego a valid claim of privilege. Indeed, a probationer is subject to no greater compulsion during the course of a noncustodial interview with his probation officer than that experienced by a grand jury witness. Moreover, he could not constitutionally be punished for validly asserting his Fifth Amendment rights. *See Spevack v. Klein, supra,* 385 U.S. at 515-16; *Malloy v. Hogan,* 378 U.S. 1, 8 (1964). Thus, a valid claim of privilege would be available to a probationer as a complete defense to probation revocation. Under *Garner,* this is sufficient to preserve the probationer's freedom "to admit, to deny, or to refuse to answer." *Garner v. United States, supra,* 424 U.S. at 657.

When a witness called to testify before a grand jury claims his Fifth Amendment privilege as a basis for refusing to answer, the grand jury may proceed in one of two ways: it may either pursue other avenues of inquiry or seek a judicial determination as to the validity of the witness's claim, in which case the witness would have to satisfy the presiding judge that his claim of privilege is valid. If in fact there is reason to apprehend danger to the witness from his being compelled to testify, the witness will be excused from testifying unless the prosecution determines that the information sought is of such overriding importance as to justify a grant of immunity under the circumstances. If, on the other hand, there is no reason to apprehend danger to the witness from his being compelled to

testify and the judge orders him to answer, the witness must answer or risk contempt. *See United States v. Mandujano, supra,* 425 U.S. at 575.

Similarly, a probationer who invokes his Fifth Amendment privilege as a reason for refusing to answer questions by his probation officer calling for incriminating responses would be constitutionally entitled, prior to the imposition of any punishment, to a preliminary hearing. *See Morrisey v. Brewer, supra,* 408 U.S. at 485. At this hearing, the presiding judge would be called upon to determine "whether there is probable cause or reasonable ground to believe that the [probationer] has committed acts that would constitute a violation of [probation] conditions." *Id.* This determination would necessarily involve an assessment of the validity of the probationer's claim of privilege.

If the judge upholds the probationer's claim, the probationer would be in the same protected situation as a grand jury witness who is excused from testifying on grounds of privilege. If the judge denies the probationer's claim of privilege, thereby finding that there is probable cause to believe that he has violated the conditions of his probation, the probationer would be constitutionally entitled to a revocation hearing. *See Morrisey v. Brewer, supra,* 408 U.S. at 487-88. At the revocation hearing, he would have an opportunity to be heard and to establish, by asserting his invocation of the privilege as a defense, that he did not violate the conditions of his probation. *Id.* Thus, upon denial of a claim of privilege, the probationer would be in the same situation as a grand jury witness whose claim of privilege is denied, namely, having to choose between making the requested disclosures and asserting his claim of privilege as a defense at a probation revocation hearing. It

is therefore evident that the mechanics that would be brought into play upon a probationer's assertion of a claim of privilege closely resemble those that operate in the context of grand jury proceedings and are not improperly coercive.

Most importantly, a valid assertion of a claim of privilege is available to probationers as a complete defense to probation revocation. It is clear under the relevant decisions of this Court that a probationer may not constitutionally be punished for asserting his Fifth Amendment privilege against self-incrimination in lieu of answering questions by his probation officer which, if answered truthfully, would result in incriminating admissions. "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement [,][namely,] the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan, supra,* 378 U.S. at 8. A "penalty" in this context is not merely a fine or imprisonment but "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Spevak v. Klein, supra,* 385 U.S. at 515.

This Court has indicated that it "find[s] no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others . . . and [that it] . . . can imply no exception." *Spevack v. Klein, supra,* 385 U.S. at 516. Accordingly, probationers, like the policemen in *Garrity* and the lawyer in *Spevack,* are constitutionally entitled to assert their Fifth Amendment privilege without suffering any punitive action that would make assertion of the privilege "costly." As a result, pro-

bation could not constitutionally be revoked on the basis of a valid and timely claim of privilege.[7]

Since respondent could not be punished for asserting his Fifth Amendment privilege in lieu of incriminating himself, he could prevail in this case only if the possibility that his claim of privilege could be tested at a revocation hearing suffices in itself to deny him the freedom to invoke the privilege. Arguably, a probationer contemplating a claim of privilege during the course of a noncustodial interview with his probation officer faces a more difficult choice than does a witness contemplating a claim of privilege in a judicial proceeding. The latter receives a ruling on the validity of his claim of privilege at the time he makes the claim and has an opportunity to reconsider before being held in contempt. The holding of the Court in *Garner v. United States*,

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[7]Moreover, under Minnesota law probation may be revoked only "[w]hen it appears that the [probationer] has violated any of the conditions of his probation or has otherwise been guilty of misconduct which warrants the imposi[tion] or execution of sentence . . . ." Minn. Stat. § 609.14, subd. 1 (1980). "If none of such grounds [is] found to exist, the [probationer] shall be restored to his liberty under the previous order of the court." Minn. Stat. § 609.14, subd. 4 (1980).

Respondent was not required to relinquish his Fifth Amendment rights as a condition of his probation. He was merely required to report to his probation officer as directed, to be truthful with her in all matters, to keep her informed of his place of residence and employment at all times, to obey the law, to pursue treatment for sexual offenders, to remain within the State of Minnesota during the term of probation, and to incur no financial indebtedness (App. C-34-35). Thus, a valid assertion of his Fifth Amendment privilege would not have constituted a violation of the conditions of probation and would not therefore have been a ground for revocation under Minn. Stat. § 609.14, subd. 1 (1980).

A valid claim of privilege is, by definition, a truthful response to a question which would otherwise elicit an incriminating response. As such, it would have been consistent with the requirement that respondent be truthful with his probation officer. Thus, had respondent invoked his Fifth Amendment privilege in lieu of making incriminating admisisons to his probation officer, his claim of privilege would have been available to him under Minn. Stat. § 609.14, subd. 1 (1980) as a complete defense to probation revocation.

supra, however, established unequivocally that "[a]s long as a valid and timely claim of privilege is available to a [person] prosecuted for [an alleged violation], [that person] has not been denied a free choice to remain silent merely because of the absence of a judicial ruling on his claim." 424 U.S. at 665. Thus, under *Garner*, the possibility that respondent's claim could be tested at a revocation hearing did not "compel" his incriminating admissions or deny him a "free choice to admit, to deny, or to refuse to answer." *Garner v. United States, supra*, 424 U.S. at 657. Rather, the protection accorded a valid claim of privilege in the context of a probation revocation hearing was sufficient as a mattter of law to preserve respondent's freedom to choose between making incriminating admissions and claiming his Fifth Amendment privilege against self-incrimination. *Id.*

Accordingly, a probationer is not subject to impermissible testimonial compulsion during the course of a noncustodial interview with his probation officer. In the absence of a valid and timely assertion of a claim of privilege, therefore, there is no constitutional basis for barring prosecutorial use of a probationer's incriminating admissions to his probation officer or for departing in the probationary setting from the long-standing rule that a person must claim his privilege against self-incrimination or lose its protection.

To be sure, the probationary status may exert some pressures on probationers generally and may engender an atmosphere conducive to truth telling. These pressures, however, are a far cry from the coercive pressures perceived by this Court in *Miranda* to be inherent in incommunicado custodial interrogation and to deprive criminal suspects of the freedom to invoke their constitutional right to remain

silent. They are also critically different from the inherently coercive choice between self-incrimination and substantial punitive action decried by this Court in *Garrity* and *Spevack*, in that a probationer has at all times the right to refuse to answer questions encroaching on areas of potential self-incrimination. Accordingly, absent a valid and timely claim of privilege or some indicia of involuntariness, a probationer's noncustodial incriminating admissions to his probation officer are not barred by the Fifth Amendment and may properly be used against him in a subsequent criminal prosecution.

III.

DUE PROCESS REQUIRES NEITHER THE ROUTINE ADMINISTRATION OF FIFTH AMENDMENT WARNINGS PRIOR TO A PROBATION OFFICER'S NONCUSTODIAL INTERVIEW OF A PROBATIONER NOR SUPPRESSION OF RESPONDENT'S INCRIMINATING ADMISSIONS TO HIS PROBATION OFFICER

Although the Minnesota Supreme Court did not expressly articulate the basis upon which its holding rests, it appears that its decision is rooted to some degree in the notion that it is somehow unfair to require a probationer to meet with his probation officer as directed and to be truthful with her when the probation officer has reason to believe that the probationer's answers to her questions, if truthful, could prove incriminating. The only available "fairness" rationale for a warnings requirement in the circumstances of this case is that warnings might have an impact on the probationer's evaluation of whether to cooperate with his probation officer or invoke his privilege against self-incrimination. This decision-making process,

however, is afforded all the constitutional protection to which it is entitled by the Self-Incrimination Clause. Thus, the Due Process Clause provides no independent constitutional basis for requiring Fifth Amendment warnings in the circumstances of this case and contributes nothing to the resolution of the question whether such warnings are required.

Assuming, however, that there are other policies implicated by the Due Process Clause, independent of the constitutional policy against compulsion, that might bear on a probationer's entitlement to Fifth Amendment warnings, we submit that there is nothing unfair in the failure to administer warnings appropriate to custodial interrogation in a noncustodial setting and that, therefore, there is no basis for holding them to be required by due process considerations. Indeed, this Court has never ruled that "the Due Process Clause require[s] the prosecution to prove as part of its initial burden that the [individual being questioned] knew he had a right to refuse to answer . . . ." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 226-27.

The critical inquiry under the Due Process Clause is whether "the behavior of law enforcement officials was such as to overbear [an individual's] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond, supra,* 364 U.S. at 544. In determining whether an individual's will to resist was overborne in a particular case the Court has traditionally "assessed the totality of all the circumstances [including] both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 226.

Some of the factors the Court has consistently relied upon in finding a confession involuntary include the youth of the

accused, *see, e.g., Haley v. Ohio,* 332 U.S. 596 (1948); his lack of education, *see, e.g., Payne v. Arkansas,* 356 U.S. 560 (1958); and his low intelligence, *see, e.g., Fikes v. Alabama,* 352 U.S. 191 (1957). The Court has also considered the length of detention, *see, e.g., Chambers v. Florida,* 309 U.S. 297 (1940); the use of overt physical force, *see, e.g., Brown v. Mississippi,* 297 U.S. 278 (1936); the use of deceptive promises and practices, *see, e.g., Spano v. New York,* 360 U.S. 315 (1959); the use of prolonged isolation from family and friends, *see, e.g., Gallegos v. Colorado,* 370 U.S. 49 (1962); the use of threats to have petitioner's children taken away from her, *see, e.g., Lynumn v. State of Illinois,* 372 U.S. 528 (1963); and the repeated and prolonged nature of the questioning, *see, e.g., Ashcraft v. Tennessee,* 322 U.S. 143 (1944).

In seeking to rest its decision on due process grounds, the Minnesota Supreme Court entirely overlooked the criteria this Court has traditionally relied upon in finding confessions involuntary and relied instead on the probation officer's failure to advise respondent of his Fifth Amendment rights and her intention to reveal to the police any information she might obtain from respondent regarding the 1974 rape and murder. These factors do not even approximate those that this Court has held to violate due process requirements. Although rights to advise a criminal suspect of his constitutional rights is a relevant criterion in determining the voluntariness of a confession, *see, e.g., Davis v. North Carolina,* 384 U.S. 737 (1966), it is not in and of itself determinative, *see Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. This Court has clearly stated that a determination of voluntariness turns on a careful scrutiny of all the circumstances surrounding a

confession, and not on the presence or absence of a single criterion such as the giving of warnings. *See Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. Similarly, the probation officer's intentions with respect to the probationer, alone or in conjunction with her failure to administer warnings, cannot possibly be said to have deprived respondent of that "fundamental fairness essential to the very concept of justice," *Payne v. Arkansas, supra,* 356 U.S. at 567 (quoting *Lisenba v. California, supra,* 314 U.S. at 236), and to have rendered his confession involuntary.

Measured against the standard enunciated by this Court in *Rogers v. Richmond, supra,* the facts of the present case do not show anything approaching a due process violation. Indeed, an examination of the circumstances surrounding respondent's interview with his probation officer reveals that the probation officer acted in a fair and dispassionate manner and that respondent's confession was the product of his free and rational choice.

Respondent, a convicted felon, is a twenty-nine-year-old high school graduate (App. C-25, C-29) who attended vocational school and later served in the military (App. C-29). As his testimony at the pretrial hearing reflects (App. C-25-30), he is articulate, intelligent, and was fully familiar with the criminal justice system at the time of his incriminating admissions (App. C-29).

Respondent was interviewed by his probation officer in surroundings that had been familiar to him for at least one year (App. C-29). He was subjected to no menacing interrogation procedures, overbearing tactics of psychological persuasion, physical coercion, lengthy incommunicado detention, threats, or promises. Indeed, the interview was conducted with a high degree of restraint and civility. More-

over, respondent was neither under formal arrest nor deprived of his freedom of action in any way (App. C-19-20). Thus, the pressures on respondent to incriminate himself, if any, are hardly comparable even with the least prejudicial of the pressures this Court has traditionally recognized as rendering confessions involuntary.

None of the foregoing factual assertions was controverted by respondent at the pretrial hearing and respondent offered no evidence as much as tending to show that the probation officer's conduct in this case, designed primarily to determine the need for further treatment, subjected him to any "hardship" within the meaning of the Due Process Clause.

Moreover, the record is devoid of any evidence that in obtaining respondent's confession the probation officer deceived him or in any way participated in an unlawful practice which deprived respondent of his fundamental rights. Respondent was told at the outset of the interview that his counselor had implicated him in the 1974 rape and murder of a seventeen-year-old woman and that his probation officer wished to talk to him about that crime in order to evaluate the need for further treatment (App. C-11, 26). Although respondent was not advised until the conclusion of the interview that his probation officer had a duty to relay to the police any information she might obtain from him regarding the rape and murder, respondent indicated that he was aware of that duty (App. C-22).

Under these circumstances, the probation officer's failure to advise respondent of his Fifth Amendment rights can hardly be said to violate "fundamental fairness" or to be "shocking to the universal sense of justice[,]" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960),

simply because it incidentally presented respondent with a choice between two entirely legitimate alternatives—asserting his privilege against self-incrimination or truthfully recounting his involvement in the 1974 rape and murder in issue. That respondent chose to adopt the latter alternative cannot be attribued to any action that the probation officer took or did not take. Rather, respondent's choice was the product of his own free will.

Finally, suppression of respondent's incriminating admissions to his probation officer would serve no "valid and useful purpose." *Michigan v. Tucker, supra,* 417 U.S. at 446. Accordingly, the drastic remedy of exclusion is inappropriate in this case. The purpose of the exclusionary rule in Fifth Amendment cases is to deter future unlawful conduct by government officials and to protect the courts from reliance on untrustworthy evidence. *Id.* at 446-48. This Court has indicated that "[t]he deterrent purpose of the exclusionary rule necessarily assumes . . . willful, or at the very least negligent, conduct which has deprived [an individual] of some right[,]" and that it "looses much of its force" where the official action "was pursued in complete good faith." *Id.* at 447. Here, the probation officer acted in complete good faith throughout the entire course of her interview with respondent and her conduct deprived respondent of no constitutional rights. The deterrent purpose of the exclusionary rule, therefore, would not be furthered by suppressing respondent's incriminating admissions. Unlike the Fourth Amendment exclusionary rule, which is deemed necessary because there is considered to be no other practical means of correcting and forestalling police behavior in violation of Fourth Amendment rights, an exclusionary principle in this context would be ad-

dressed to the regulation of the conduct of court-appointed officials. There is no reason to suppose that there would be any significant incidence of disobedience by such officials to a requirement to administer warnings to probationers.

In addition, suppression of respondent's admissions would not further the trustworthiness purpose of the exclusionary rule because even the Minnesota Supreme Court recognized that respondent's incriminating admissions were "trustworthy evidence" (App. A-11). Accordingly, the drastic remedy of exclusion is unwarranted in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the judgment of the Minnesota Supreme Court should be reversed.

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No. 82-827

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a probation officer who uses the court's compulsory processes to elicit incriminatory statements from a probationer must first advise the probationer of the privilege against compelled self-incrimination in order for such statements to be admissible against the probationer in a criminal trial.

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IN THE

Supreme Court of the United States

October Term, 1982

No. 82-827

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On August 19, 1980, Marshall Donald Murphy (hereinafter respondent) pleaded guilty to a charge of false imprisonment. On September 22, 1980, he was sentenced to fifteen months imprisonment, execution of which was stayed three years with three years probation. Pet. App. C31.

Mara Widseth, of the Hennepin County Department of Court Services, was appointed to supervise the respondent's probation. As the respondent's probation officer, Widseth was acting as an "official representative of the [c]ourt." Pet. App. C33. The sentencing court ordered the respondent to be truthful to Widseth "in all matters" and to report to Widseth "as directed." Pet.App. C32,

34. Failure to comply with either of those orders would be grounds to revoke the respondent's probation. Pet.App. C13, 32.

As a special condition of probation, the respondent was ordered to pursue treatment at Alpha House. Pet.App. C32. On or about July 3, 1981, Widseth learned that the respondent failed to complete the treatment program. Pet. App. C7, 8. On July 14, 1981, Widseth wrote the respondent a letter requesting that he contact her. The letter stated, "Failure to do so will result in an immediate request for a warrant." Pet.App. C35. On July 21, 1981, the respondent met with Widseth. Because the respondent was apparently doing well without treatment, Widseth decided not to seek revocation of the respondent's probation. Pet.App. C14. Widseth retained the authority to require the respondent to resume treatment. Pet.App. B3, C14, 15.

On September 11, 1981, the respondent met again with Widseth at the probation office. Pet.App. C8. This meeting was one of several monthly meetings which the respondent arranged by calling Widseth for an appointment. Pet.App. C5. After this meeting, the respondent was under no obligation to arrange another meeting until mid-October 1981. Pet. App. B4.

On September 22, 1981, Widseth was told by a psychologist from Alpha House that, during treatment, the respondent said that several years earlier he had committed a rape-murder and that the police had not arrested him because of a lack of evidence. Pet.App. C2, 9, 15.

On September 24, 1981, Widseth met with her supervisor to discuss what to do with the new information. Pet.App. C15. They decided that Widseth must report

the information to the police and that she should tell the respondent about that decision. Pet.App. C16. On that same day, Widseth wrote the respondent the following letter:

September 24, 1981

Mr. Marshall Murphy

[address]

Dear Marshall:

To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon receipt of this letter to set an appointment.

Mara Widseth
Probation Officer

Pet.App. C36

On September 28, 1981, in response to Widseth's letter, the respondent met with her at her office. Widseth "confronted" the respondent with her information from Alpha House about the murder. Pet.App. C9. She told the respondent that his conduct during the murder was "strongly related behaviorally" to the conduct underlying his false imprisonment charge "and that that needed to be dealt with [by] continued treatment." Pet.App. C9. The respondent was "shocked" that Widseth knew about the murder. Pet.App. C26. He expressed anger because he thought that everything said in treatment was confidential. Pet.App. C16, 21. The respondent then said that he "felt like calling an attorney." Pet.App. A3, C16, 21. Widseth told the respondent that "he would have to contact an attorney outside [the] office" because her "main concern at this time" was the relationship between the two offenses

and the respondent's need for further treatment. Pet.App. B5, C16.

The respondent said that the false imprisonment and the murder were not related because he was innocent of the false imprisonment charge and that at the time of the murder he had been using drugs. Pet.App. C17, 18. After discussing the false imprisonment charge, the respondent told Widseth about the murder. Pet.App. C10, 11, 18.

It was not until after the respondent described the murder that Widseth told him about her intent to report her information to the police. When questioned by the trial court, the probation officer testified:

> The Court: [ ] So that I understand this fully, when you sent for the [respondent] and asked to speak to him, you knew, did you not, that you were going to speak to him on the topic of information you heard about the possible rape-murder?
>
> The Witness: Yes.
>
> The Court: And do I understand from your testimony that you also knew in advance that you were going to pass the information on to the police?
>
> The Witness: Yes.
>
> The Court: Did you advise him in advance of that fact before questioning him?
>
> The Witness: No, I did not.
>
> Pet.App. C24

After telling the respondent that she was going to the police, Widseth encouraged the respondent to turn himself in to the police. At the respondent's request, Widseth gave him "permission" to leave the probation office and think about it. Pet.App. B5, C18. The respondent left the probation office and contacted a lawyer. Pet.App. C28.

On September 30, 1981, the respondent called Widseth and told her that he would not turn himself in to the police. Pet.App. B5, C28.

On October 2, 1981, the respondent was arrested on a probation violation warrant alleging his failure to complete treatment and on a warrant charging him with murder in the second degree. Pet.App. B5, C14, 15. The respondent was subsequently indicted for murder in the first degree.

At a pretrial hearing, the respondent moved to suppress his statements made to Widseth. The trial court denied the motion, ruling that although it would have been the "better practice" to have advised the respondent of the privilege against self-incrimination, such an advisory was not constitutionally required because the respondent was not in custody within the meaning of *Miranda*. Pet.App. B6. The trial court also held that the respondent's statements were voluntary. Pet.App. B14.

At the pretrial hearing, respondent argued that his request for a lawyer constituted an invocation of the privilege against self-incrimination. Pet.App. B6. In its memorandum, the trial court did not specifically address that issue. In the statement of facts, the trial court noted that "[b]oth the probation officer and [the respondent] testified that [the respondent] spoke of obtaining an attorney." Pet. App. B5. The trial court addressed the legal effect of the respondent's request for a lawyer only in its analysis of whether the respondent's statements were voluntary. The trial court said:

> [The respondent] now claims that he asserted a right to talk to an attorney, and whatever his real intent may have been, we are persuaded by the proba-

tion officer's testimony that he did not express that desire in any context other than a civil suit for breach of confidentiality. Pet.App. B13, 14

The trial court certified the suppression issues to the Minnesota Supreme Court. Pet.App. B17. The pretrial hearing transcript revealed that the probation officer did not testify that the respondent expressed his desire for a lawyer in terms of a civil suit. Pet.App. C20, 21.

The Minnesota Supreme Court reversed. The court held that because the respondent was under court order to meet with his probation officer and answer her questions truthfully, and because the probation officer had substantial reason to believe that the answers to her questions would be incriminatory, the respondent could rely on the privilege against self-incrimination to bar at trial the admission of his statements to the probation officer. The court also held that, as a matter of due process, the probation officer was required to advise the respondent of his privilege against self-incrimination before questioning him about the murder. Pet.App. A10. The court credited the respondent's testimony: (1) that he did not know he had a right to consult with a lawyer or refuse to answer the probation officer's questions; and (2) that, based on the probation officer's comments, he thought the only reason for discussing the murder was to determine whether he needed further treatment. Pet.App. A4.

The Minnesota Supreme Court stated that it need not decide the issue of whether respondent's request for a lawyer constituted an invocation of the privilege against self-incrimination. Pet.App. A9. In its recitation of the facts, the court stated that the respondent told the probation

officer "that he felt his confidence had been breached by the disclosure and that he felt like calling an attorney." Pet.App. A3.

The Minnesota Supreme Court remanded the case to the trial court. On the respondent's motion, the trial court dismissed the indictment for insufficient evidence. The trial court stayed the dismissal order pending a decision by this Court. Pet.App. D3.

SUMMARY OF ARGUMENT

I.

A government official must advise an individual of the privilege against compelled self-incrimination in order to introduce the individual's statements at a criminal trial when the following three factors exist: (1) the individual is compelled, within the meaning of the Self-Incrimination Clause, to speak to the government official; (2) the government official has substantial reason to believe that the answers to his questions will incriminate the individual; and (3) the questioning is conducted in the absence of impartial observers or without providing an opportunity for the individual to consult with a lawyer. *Miranda v. Arizona*, 384 U.S. 436 (1966).

If an interrogation is conducted by a judicial officer who has legal authority to compel truthful answers to questions, then the Self-Incrimination Clause governs regardless of whether the interrogation is custodial. *Michigan v. Tucker*, 417 U.S. 433, 439-40 (1974). See e.g., *In Re Gault*, 387 U.S. 1 (1967) (juvenile proceedings); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (civil proceedings); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (grand

jury proceedings). The legal power to order an individual to report to a designated place and answer questions truthfully is "genuine compulsion." *Michigan v. Tucker, supra,* at 440.

The rule requiring an individual to assert the privilege in order to invoke it is based on the assumption that the government generally does not know whether its compulsory processes will elicit incriminatory testimony. *Garner v. United States,* 424 U.S. 648, 655 (1976). If the rule were otherwise, the government would often unintentionally immunize a witness' compulsory testimony. *United States v. Monia,* 317 U.S. 425, 442 (1943) (Frankfurter, J., dissenting). If the government has substantial reason to believe that its compulsory processes will elicit incriminatory testimony, then the rationale for the rule does not exist and the rule has not been applied. *Garner, supra,* at 657-61. See also, *Rhode Island v. Innis,* 446 U.S. 291 (1980).

This Court has only applied the rule requiring an individual to assert the privilege in order to invoke it in cases where the individual was either advised of the privilege against self-incrimination, e.g., *Fare v. Michael C.,* 442 U.S. 707 (1979), or otherwise had some opportunity to consult with a lawyer before deciding whether to make the compulsory disclosure. *Garner v. United States,* 424 U.S. 648, 658 (1976) (filing a tax return); *United States v. Kordel,* 397 U.S. 1, 9-10 (1970) (answering an interrogatory in civil lawsuit). The ability to assert the privilege can often be dependent upon having access to legal advice. *Maness v. Meyers,* 419 U.S. 449 (1975).

The privilege against self-incrimination is self-executing under the facts of this case. First, the probation officer

was an "official representative of the [c]ourt" who had the legal authority to compel the respondent's presence in her office and to compel the respondent to give truthful answers to her questions. Pet.App. A10, C31-35. Second, ". . . the probation officer knew that the information she was requesting would be incriminatory, and further that she . . . intend[ed] to turn that information over to the police." Pet.App. B13. Third, unlike a witness served with a grand jury subpoena, the respondent had no idea he was going to be interrogated about a criminal conduct and, therefore, he had no opportunity to consult with a lawyer before going to the probation office.

Once inside the probation office there were no impartial observers to guard against the kind of menacing interrogation techniques which concerned this Court in *Miranda*. The probation officer took advantage of the opportunity to use those techniques. She "confronted" the respondent with her knowledge of the murder. Pet.App. C9. Although she at all times intended to report the respondent's statements to the police, she told the respondent only that her concern was with further treatment. Pet.App. C9, 16, 17, 24. When the respondent said he felt like calling a lawyer, the probation officer refused to allow him to do so. She repeated that her "main concern" was with further treatment. Pet.App. C16. This Court has never required an individual to assert the privilege under facts comparable to these.

The Minnesota Supreme Court decision serves the best interests of the probation system without undermining the legitimate needs of law enforcement.

Generally, if a probation officer obtains information concerning criminal conduct by a probationer, the proba-

tion officer can give that information to a law enforcement agency to be handled like any other criminal investigation. If the court's compulsory processes are needed to further investigate the alleged criminal conduct, then the grand jury system is available.

The Administrative Office of the United States Courts instructs federal probation officers to refrain from testifying against probationers in criminal trials. See Note 14, *infra*. Under the federal probation system and the probation system envisioned by the Minnesota Supreme Court, when a probation officer asks a probationer about alleged criminal conduct, the answers to those questions will only be used to determine whether to further regulate or revoke probation. A Fifth Amendment warning is not required for that purpose. Pet.App. A7-8. It will only be in those rare cases when the probation officer wants to preserve the evidentiary value of the probationer's statements that the probation officer must advise the probationer of the privilege against self-incrimination.

The trust relationship in the probation system is undermined when statements made in confidence to a probation officer are introduced against a probationer in a criminal trial. The Minnesota Supreme Court decision protects that trust relationship without impairing the proper functioning of law enforcement.

II.

An individual on probation may legitimately assert the privilege against self-incrimination in order to protect himself against further criminal prosecution. Cf. *Roberts v. United States*, 445 U.S. 552 (1980).

The Self-Incrimination Clause limits the power of the government to use its compulsory processes to obtain testimony from an individual when the government has notice of two things: (1) that the testimony it seeks will incriminate the individual; and (2) that the individual objects to the government seeking that testimony. *Garner v. United States*, 424 U.S. 648, 655 (1976). The individual's objection can be made "in any language that a [government official] may reasonably be expected to understand as an attempt to invoke the privilege. . . ." *Quinn v. United States*, 349 U.S. 155, 162-63 (1955). If a government official knows that his compulsory processes are going to elicit incriminatory testimony, then the government official cannot arbitrarily deny an individual's request to consult with a lawyer. See, *United States v. Mandujano*, 425 U.S. 564, 582 (1976) (Burger, C.J., plurality); *Maness v. Meyers*, 419 U.S. 449, 472 (1975) (Stewart, J., concurring). See also, *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

In this case the probation officer knew that the answers to her questions would be incriminatory and she knew the respondent wanted to call a lawyer before talking about the murder. The probation officer's subsequent interrogation exceeded the limits of her constitutional authority.

ARGUMENT

I.

A PROBATION OFFICER WHO USES THE COURT'S COMPULSORY PROCESSES TO ELICIT INCRIMINATORY STATEMENTS FROM A PROBATIONER MUST FIRST ADVISE THE PROBATIONER OF THE PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION IN ORDER FOR SUCH STATEMENTS TO BE ADMISSIBLE AGAINST THE PROBATIONER IN A CRIMINAL TRIAL.

A. An Individual Need Not Assert The Privilege In Order To Invoke It If He Is Interrogated By A Government Official Pursuant To A Compulsory Process And The Interrogation Occurs In The Absence Of Impartial Observers Or Without Providing The Individual An Opportunity To Consult With A Lawyer.

This Court has said that a government official must advise an individual of the privilege against self-incrimination prior to interrogation when the following three factors exist: (1) the individual is under compulsion within the meaning of the Self-Incrimination Clause to speak to the government official; (2) the government official has substantial reason to believe that the answers to his questions will incriminate the individual; and (3) the questioning is conducted in the absence of impartial observers or without providing an opportunity for the individual to consult with a lawyer. If these three elements exists, then an individual need not have asserted the privilege at the

time of his interrogation in order to invoke the privilege at his subsequent criminal trial. *Miranda v. Arizona*, 384 U.S. 436 (1966).

1. Prior to *Miranda*, the principle issue in cases involving confessions to police officers "was not whether the individual waived the privilege against compulsory self-incrimination but simply whether his statement was 'voluntary'." *Michigan v. Tucker*, 417 U.S. 433, 441 (1974). The rationale used to exclude a Self-Incrimination Clause analysis from these cases was that police officers did not have the legal authority to compel answers to questions. See, Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L.Rev. 59 (1966). In *Miranda*, the Court applied the Self-Incrimination Clause to custodial interrogations by police officers reasoning that in those situations there are "inherently compelling pressures which work to . . . compel [the individual] to speak where he would not otherwise do so freely." 384 U.S. at 467.

The concept of custodial interrogation is not limited to the police station, *Orozco v. Texas*, 394 U.S. 324 (1969); nor does questioning at a police station necessarily constitute custodial interrogation. *Oregon v. Mathiason*, 429 U.S. 492 (1977). The test for custody is whether the individual's "freedom of action is curtailed in any significant way. . . ." *Miranda*, 384 U.S. at 467.

If an interrogation is conducted by a judicial officer who, in contrast to a police officer, has the legal authority to compel truthful answers to questions, then the Self-Incrimination Clause governs regardless of whether the interrogation was custodial. *Michigan v. Tucker*, 417 U.S.

433, 439-40 (1974); *Miranda v. Arizona*, 384 U.S. 436, 526-27 (1966) (White, J., dissenting). *Wood v. United States*, 128 F.2d 265, 268 (D.C. Cir. 1942) (opinion of Judge Rutledge). The Self-Incrimination Clause has been held applicable to grand jury proceedings, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); to civil proceedings, *McCarthy v. Arndstein*, 266 U.S. 34 (1924); and to juvenile proceedings, *In Re Gault*, 387 U.S. 1 (1967). See also, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Watkins v. United States*, 354 U.S. 178 (1957). When the questioning of an individual has occurred in these kinds of proceedings, then "there has been [a] genuine compulsion of testimony. . . ." *Michigan v. Tucker, supra*, at 440.

2. In order for the government to function, it must be able to compel testimony from individuals. The burden is generally on the individual to assert the privilege against compelled self-incrimination in order to invoke it. This rule is based on the assumption that unless an individual asserts the privilege, the government will not know whether its compulsory processes are going to elicit testimony which will be incriminatory in nature. *Garner v. United States*, 424 U.S. 648, 655 (1976).[1] If the burden

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[1]The Solicitor General cites *Garner* to support the proposition that the reason for requiring an individual to assert the privilege is because the government can ordinarily assume that an individual's response to a compulsory process is the result of a voluntary choice. Brief for the United States, P. 21. That is not what the Court in *Garner* assumed. The Court said:

> Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. *Only the witness knows whether the apparently innocent disclosure sought may incriminate him*, and the burden appropriately lies with him to make a timely assertion of the privilege. 424 U.S. at 655 (Emphasis added)

were not on the individual to assert the privilege, then the government would often unintentionally immunize an individual's compulsory testimony. *United States v. Monia*, 317 U.S. 425, 442 (1943) (Frankfurter, J., dissenting). See, Westen and Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response"*, 19 Am.Cr.L.Rev. 521 (1982) (hereinafter Westen and Mandell).

If the government has substantial reason to believe that its compulsory processes will elicit incriminatory information, then the government cannot complain that it unknowingly immunized a person's compulsory testimony. Under these circumstances the rule requiring an individual to assert the privilege has not been applied. See e.g., *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966). See also, *Rhode Island v. Innis*, 446 U.S. 291 (1980).

3. A central concern of the Court in *Miranda* was the ability of police officers to use intimidating and deceptive interrogation techniques in order to impair a suspect's ability to assert the privilege against self-imcrimination. *Miranda*, 384 U.S. at 448-55. The Court recognized that these interrogation techniques cannot occur during judicial investigations when the questioning takes place in the presence of impartial observers. *Miranda*, 384 U.S. at 461. See, *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (Burger, C.J., plurality).

Similarly, these interrogation techniques are not likely to occur if the individual has an opportunity to consult with a lawyer prior to the interrogation. The rule requiring an individual to assert the privilege in order to invoke

it has been applied by this Court only when the individual was either advised of his privilege against self-incrimination, e.g., *Fare v. Michael C.*, 442 U.S. 707 (1979); or otherwise had time to consult with a lawyer before deciding whether to make the compulsory disclosure. *Garner v. United States*, 424 U.S. 648, 658 (1976) ("a taxpayer . . . can complete his return at leisure and with legal assistance . . ."). *United States v. Kordel*, 397 U.S. 1, 9-10 (1970) ("The respondents do not suggest that Feldten, who answered the interrogatories on behalf of the corporation, did so while unrepresented by counsel or without appreciation of the possible consequences."); See also, *Roberts v. United States*, 445 U.S. 552, 561 (1980) ("petitioner was represented by counsel who was fully apprised —as was petitioner—that the extent of petitioner's cooperation could be expected to affect his sentence"); *United States ex. rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (refusal to testify at a deportation hearing without asserting the privilege was based upon advice from counsel.)

If a judicial investigation does not allow time for an individual to consult with a lawyer or if the judicial investigation occurs in the absence of impartial observers, then the intimidating and deceptive interrogation techniques which concerned the Court in *Miranda* are available to any government official who knowingly uses the court's compulsory processes to incriminate an individual. **Under these circumstances, the government official must advise the individual of the privilege against self-incrimination. If the government official fails to do so, then the individual may make the compulsory disclosure without forfeiting his right to invoke the privilege at a subsequent criminal trial.**

B. The Respondent Was Compelled Within The Meaning Of The Self-Incrimination Clause To Answer His Probation Officer's Questions.

The power of a probation officer is qualitatively different from the power of a police officer. It is no less compelling. In *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); the Court described the power of probation officers as follows:

> [T]he probation officer acts as an extension of the judiciary's authority to set the conditions under which particular individuals will lead their lives and of the executive's authority to *coerce obedience* to those conditions. From the perspective of the probationer, his *probation officer may personify the State's sovereign powers*. . . . 454 U.S. at 447 (Emphasis added)

The forces which compel a probationer to talk to a probation officer arise from the fear of a legal sanction if the probationer does not talk. A probation officer is ". . . *armed* with the power to recommend or even to declare revocation." *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973) (Emphasis added).[2] The probation officer's power to recommend probation revocation, along with the probationer's duty to cooperate with the probation officer, implicitly create the inference that legal sanctions are likely if the probationer fails to respond when questioned. The Court in *United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972), said, "A parolee is under heavy psychological pres-

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[2] "While it is the judge who actually revokes probation, it is the probation officer who initiates the revocation action and largely controls it." Zajkoski, *Exposing the Quasi-Judicial Role of the Probation Officer*, 37 Fed.Prob. 9, 12 (Sept. 1973).

sure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." The fear of a legal sanction for a refusal to submit to questioning has historically been recognized as the essence of compulsion. *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).[8]

In addition to the power to recommend probation revocation, a probation officer has the power to detain a probationer in the probation office. In this case, the respondent was ordered by the court to report to his probation officer "as directed." Pet.App. C32. The respondent testified that he believed that if he had walked out of the probation office without the probation officer's permission, then his probation would have been revoked. Pet.App. C26. The probation officer agreed with the statement that the respondent left her office with her "permission." Pet. App. C18. The Solicitor General characterized the respondent's leaving the probation office as follows: "Widseth *allowed* respondent to leave her office. . . ." Brief for

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[8]The Solicitor General argues that a general requirement on a probationer to be cooperative with his probation officer does not amount to compulsion unless the probation officer gives a probationer ". . . some reason to believe that he was being uncooperative in a way that violated the conditions of his probation. . . . ." Brief for the United States, P. 19. At the time the respondent discussed the murder with his probation officer, the respondent was in violation of his probation for having failed to complete a treatment program. Pet. App. C14-15. The probation officer told the respondent that she wanted to talk about the murder because she believed he needed to go back to treatment. The respondent had every reason to believe that if he was going to be uncooperative with respect to discussing his need for treatment then there would be a probation violation for having failed to complete treatment. According to the Solicitor General's own standards, the respondent was compelled within the meaning of the Self-Incrimination Clause to make incriminatory statements.

the United States, P. 4 (Emphasis added). If at any time during the interrogation the respondent had walked out of the probation office without the probation officer's permission, then, under state law, the probation officer could have caused the respondent to have been "taken into immediate custody" and held without bail pending a revocation hearing. Minn. Stat. §609.14, Subd. 1. See, Pet. App. D4. "Viewed from the eyes of a probationer, the [probation] office represents a power that can, and does, limit his freedom." Arcaya, *The Multiple Realities Inherent in Probation Counseling*, 37 Fed.Prob. 58, 59 (Dec. 1973).

The legal power of a probation officer to order a probationer to report to a designated place and remain there to answer questions truthfully is sufficient to bring this case within the protections of the Self-Incrimination Clause. This case does not turn on whether the door to the probation office was locked.

C. The Probation Officer Had Substantial Reason To Believe That The Answers To Her Questions Would Incriminate The Respondent.

At the time the probation officer questioned the respondent about the murder, the probation officer knew that the answers to her questions would be incriminatory. The trial court found: "[T]here is no question that the probation officer knew that the information she was requesting would be incriminating, and further that she was intending to turn the information over to the police." Pet.App. B13. Under these facts, there is no legitimate state interest in requiring the respondent to assert the privilege in order to invoke it. See, Pages 14-15, *supra*.

The petitioner argues that the strength and content of the probation officer's suspicions are irrelevant to a "Fifth Amendment" analysis. Petitioner's Brief on the Merits, P. 26-29. See also, Brief for the United States, P. 26. Reliance for this position is placed on *Beckwith v. United States*, 425 U.S. 341 (1976).

In *Beckwith*, the issue before the Court was whether the principles of *Miranda* should apply during a non-custodial police interrogation simply because the investigation had focused on the accused. 425 U.S. at 345. The Court held that it is only custodial police interrogation which triggers the Self-Incrimination Clause and that non-custodial police interrogation is governed by the Due Process Clause regardless of the strength or content of the police suspicions. 425 U.S. at 346-48.

Beckwith is distinguishable from this case. This case is governed by the Self-Incrimination Clause regardless of whether the respondent was in custody. In cases governed by the Self-Incrimination Clause, the strength and content of the government official's suspicions are highly relevant in determining the admissibility of statements made to that official. See, *Rhode Island v. Innis*, 446 U.S. 291, 301-02 n. 7 (1980).[4]

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[4]It is no answer to say that the probation officer was really concerned with respondent's need for further treatment. Petitioner's Brief on the Merits, P. 28. As stated by Professor Kamisar:

> . . . so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police "interrogation" *regardless of its primary purpose or motivation*, and that if it otherwise qualifies as "interrogation" *it does not become something else* because the interrogator's main purpose is [something other] than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall.

The Minnesota Supreme Court's emphasis on the probation officer's knowledge and intent led to a result in this case which is consistent with the decisions of other courts in similar cases.

In cases where the probation officer questioned the probationer in police custody, courts have uniformly held that absent *Miranda* warnings, statements made by the probationer to the probation officer cannot be used against the probationer in his criminal trial.[8] When a government official questions someone whom the police have just arrested, it is presumed that the government official has substantial reason to believe he will elicit incriminatory information. *Garner v. United States*, 424 U.S. 648, 657 (1976).

In cases where the probation officer's questioning of a probationer was not conducted in police custody, the courts' decisions have turned on whether the probation officer was attempting to elicit incriminatory information. In

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Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 Geo.L.J. 1, 9 (1978) (Emphasis in original). See also, White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 Mich.L.Rev. 1209, 1233 n. 154 (1980).

The Solicitor General does not dispute that the probation officer interrogated the respondent within the meaning of *Rhode Island v. Innis, supra.* Brief for the United States, P. 10 n.3.

[8]See e.g., *United States v. Deaton*, 468 F.2d 541 (5th Cir. 1972); *United States v. Steele*, 419 F.Supp. 1385 (W.D.Pa. 1976); *People v. Diesing*, 67 Ill.App.3d 109, 384 N.E.2d 575 (1978); *State ex. rel. Struzik v. Department of Health and Social Services*, 77 Wis.2d 216, 252 N.W.2d 660 (1977); *State v. Magby*, 113 Ariz. 345, 554 P.2d 1272 (1976); *State v. Gallagher*, 38 Ohio St.2d 291, 313 N.E.2d 396 (1974), remanded, 425 U.S. 257, on remand, 46 Ohio St.2d 225, 348 N.E.2d 336 (1976); *State v. Williams*, 486 S.W.2d 468 (Mo. 1972); *State v. Lekas*, 201 Kan. 579, 442 P.2d 11 (1968).

People v. Parker, 82 A.D.2d 661 (App.Div. 1981), aff'd., 57 N.Y.2d 815 (1982), the probation officer had reason to believe that statements he was eliciting from the probationer would lead to a criminal prosecution against the probationer. The court suppressed those statements at the probationer's criminal trial.[6] In *State v. Roberts*, 14 Wash.App. 727, 544 P.2d 754 (1976), the probationer telephoned his probation officer and volunteered incriminatory information. The court held that the probationer's statements were admissible at trial. In *State v. Fields*, 291 Or. 872, 635 P.2d 376 (1981), the probation officer was attempting to incriminate the probationer in the presence of a police officer. The probationer was told that he was not under arrest and that he did not have to answer any questions. With one judge dissenting, the court held that probationer's statements were admissible at trial.

Taken together, these cases stand for the principle that when a probation officer has substantial reason to believe that the answers to his questions will be incriminatory, then the resulting statements are not admissible in the probationer's criminal trial absent a knowing waiver of the privilege against self-incrimination.[7] These cases are con-

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[6]This decision reversed *People v. Parker*, 101 Misc.2d 800, 421 N.Y.S.2d 561 (1979), which the trial court in this case relied on extensively in its memorandum. Pet.App. B9-11. At the time the trial court wrote its memorandum, both trial counsel and the trial court failed to notice that *Parker* had been reversed.

[7]The federal cases cited by the Solicitor General fit within this framework. See, Brief for the United States, P. 15 n. 9. In *United States v. Miller*, 543 F.2d 713 (10th Cir. 1981); and *United States v. Holmes*, 594 F.2d 1167 (8th Cir.), cert. denied, 444 U.S. 873 (1979), there was no indication that the probation officers were attempting to elicit incriminatory information with respect to a new criminal offense. *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); and

sistent with the decision of the Minnesota Supreme Court.

D. The Respondent Had No Opportunity To Consult With A Lawyer Before Making The Compulsory Disclosure.

During their monthly meetings, the respondent and the probation officer would discuss the respondent's "life situation . . ., his progress at Alpha House . . ., his employment . [and his] personal relationships." Pet.App. C6. After receiving the probation officer's letter stating that she wanted to talk about further treatment for the remainder of his probation, the respondent had no reason to believe that he was going to the probation office to be interrogated about a murder. Unlike a witness who is served with a subpoena to testify before a grand jury, the respondent had no reason to consult with a lawyer before going to the probation office.

Once inside the probation office, the probation officer "confronted" the respondent with her knowledge of the murder. Pet.App. C9. The respondent was "shocked."Pet. Pet.App. C26. The sentencing judge had ordered him to cooperate with his probation officer or face revocation,[8]

United States v. Delago, 397 F.Supp. 708 (S.D.N.Y. 1974), concerned only the admissibility of statements in a probation revocation hearing. The Minnesota Supreme Court's holding is limited to the admissibility of statements in a criminal trial.

[8]This Court in dictum has referred to *Garrity v. New Jersey*, 385 U.S. 493 (1967), as a case involving an automatic penalty for asserting the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Garner v. United States*, 424 U.S. 648, 661 (1976). However, the Court in *Garrity* did not strike down an automatic penalty statute. 385 U.S. at 496. Compare, *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Sanitation Men v.*

but he knew that if he cooperated with his probation officer now, he would implicate himself in a murder. The probation officer was telling him that the purpose of talking about the murder was to determine if he had to go back to treatment, but he knew that the penalty for murder is prison. He believed that everything he said in treatment was confidential, but now it appeared too late to remain silent because his private statements had already been made public. See, *Brown v. Illinois*, 422 U.S. 590, 605 n.

Sanitation Commissioner, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967). Nor was the police officer in *Garrity* told that the penalty for asserting the privilege would be automatic. The police officer was told only that he "may be subjected to a proceeding to have [him] removed from office" if he asserted the privilege. 385 U.S. at 504 n. 1.

If the taxpayer in *Garner* had asserted the privilege, then he would have been subject to a criminal prosecution which could have resulted in the loss of his liberty. In *Garner*, the Court held that the taxpayer forfeited the privilege by failing to assert it on his tax return. In *Garrity*, the Court held that the police officer did not forfeit the privilege by testifying at the attorney general's investigation. The distinction is that the taxpayer in *Garner* had ample opportunity to talk to a lawyer before filing his tax return, whereas the police officer in *Garrity* was told about potential legal proceedings immediately prior to the time he was to testify and without the presence of a lawyer. Having no opportunity to intelligently reflect on his choices, the police officer did not forfeit the privilege by making the disclosure. See, Westen and Mandell, 19 Am.Cr.L.Rev. 521, 537-38 (1982).

In contrast to *Garner* and *Garrity*, this case does involve an automatic penalty for asserting the privilege. The petitioner concedes that if the respondent had asserted the privilege, the respondent would have faced a probation revocation hearing. Petitioner's Brief on the Merits, P. 38-40. The probation officer could have caused the respondent to "be taken into immediate custody" and held without bail pending the revocation hearing. Minn. Stat. §609.14, Subd. 1. See, Pet.App. D4. Unlike the taxpayer in *Garner*, who was entitled to bail in the event of a criminal prosecution, the respondent was facing an automatic loss of liberty if he asserted the privilege.

12 (1975). He told his probation officer that he felt like calling a lawyer, but the probation officer would not allow him to do that.[9] At this point, the respondent found himself in "an unfamiliar atmosphere" and subject to "menacing . . . interrogation procedures." Miranda, 384 U.S. at 457.

One of the menacing interrogation techniques referred to

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[9]The trial court found that the probation officer told the respondent that "he would have to contact an attorney outside the office." Pet.App. B5. Based on the probation officer's response, it is clear that the respondent expressed to her that he wanted to call an attorney before continuing with the conversation. The petitioner has never claimed that the probation officer did not know that the respondent wanted to call a lawyer.

The only conceivable factual dispute concerns what the respondent wanted to talk to a lawyer about. The trial court made no factual finding with respect to what the respondent's "real intent" was when he asked for a lawyer. Pet.App. B13. The trial court simply said that he was "persuaded by the probation officer's testimony" that the respondent's request for a lawyer was made solely in the context of "a civil suit" for the breach of confidentiality. Pet.App. B14. It should now be undisputed that the probation officer never testified about a "civil suit." Pet.App. C20-21; Pet.App. A3. Having made no factual finding with respect to the respondent's real intent when he asked for an attorney, and having erroneously stated that the probation officer testified about a civil suit, it is simply untrue to say, "[t]he trial court found . . . respondent's comment [about an attorney] related only to what respondent considered to be Alpha House's breach of confidentiality, not Widseth's questioning." Brief for the United States, P. 22 n. 13.

There is no significant distinction between wanting to talk to a lawyer about a perceived breach in confidentiality and wanting to talk to a lawyer about Widseth's questioning. If the respondent had been allowed to call a lawyer, he undoubtedly would have told the lawyer about the *facts* of the case; those being a disclosure by the treatment facility to the probation officer and the probation officer's subsequent questions. It is incredible to suggest that the respondent wanted to talk to a lawyer about one aspect of his case but that he did not want to talk to a lawyer about the other.

in *Miranda* was for the interrogator to posit the guilt of the accused as a known fact and then to focus the interrogation on why the act was done. *Miranda*, 384 U.S. at 450. That is exactly what the probation officer did to the respondent. The probation officer posited the respondent's guilt when she "confronted" him with her knowledge of the murder. Pet.App. C9. She then focused the interrogation on treatment and the behavioral relationship between the murder and the false imprisonment. Pet.App. C9, 16-17. During this entire episode, the probation officer intended to report the respondent to the police. Pet. App. C24.[10]

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[10]The Minnesota Supreme Court's reference to due process indicates the court believed that the probation officer's conduct was deceptive. Pet.App. A10. In *United States v. Kordel*, 397 U.S. 1 (1970), the government obtained admissions from the defendant during discovery in a civil case and later used those admissions against the defendant in a criminal case. The Court said that there was no due process violation because during the civil proceeding the government advised the defendant that a criminal prosecution was being "contemplate[d]." 397 U.S. at 12. Presumably, the Minnesota Supreme Court referred to due process as basis for a warning requirement because the probation officer was contemplating a criminal prosecution while purporting to use the court's compulsory processes for some other purpose.

The petitioner notes that at some point the respondent told the probation officer that he was aware of her duty to report him to the police. Petitioner's Brief on the Merits, P. 45. The respondent made that statement *after* the probation officer told him that it was her obligation to report "the information" to the police. According to the probation officer, the respondent replied, "he understood that I would need to do that, and . . . he felt I really cared about him because I could have just picked up the phone and dialed the police." Pet.App. C21.

That statement by the respondent to his probation officer underscores the fact that the respondent did not understand his legal rights. According to applicable confidentiality laws, the probation officer was prohibited from telling the police about the information

A probation interview which focuses on a treatment plan is not viewed by a probationer as a "phase of the adversary system." *Miranda*, 384 U.S. at 469.[11] During probation interviews, "concern for the *client* dominates [the probation officer's] professional attitude." *Gagnon v. Scarpelli*, 411 U.S. 778, 783-84 (1973) (Emphasis added), quoting, F. Remington, D. Newman, E. Kimball, M. Melli and H. Goldstein, Criminal Justice Administration, Ma-

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she received from the treatment facility. See Note 15, *infra*. She needed to have the respondent talk about the murder in her presence before she had something which she could report to the police.

In determining what the respondent knew while he talked about the murder, the Minnesota Supreme Court did not refer to statements made by the respondent after he talked about the murder when the probation officer first told him about her intent to go to the police. The court credited the respondent's testimony that he was unaware of his Fifth Amendment rights at the time he talked about the murder and that he thought he was only talking about his need for further treatment as part of his probation. Pet.App. A.4.

[11]In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court grounded the *Miranda* warning requirement on the custodial nature of the court ordered psychiatric examination. *Id.* at 467. However, the Court's underlying concern appears to have been that, absent a *Miranda* warning, the non-adversarial nature of a court ordered competency examination would lead a person to believe that statements made during the compulsory examination would not be used in a criminal trial. *Id.* at 468. Federal courts have expressed a similar concern regardless of whether the court ordered psychiatric examination took place in a custodial setting. *Gibson v. Zahradnick*, 581 F.2d 75, 79 (4th Cir.), cert. denied, 439 U.S. 996 (1978); *United States v. Reifsteck*, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); *United States v. Alvarez*, 519 F.2d 1036, 1041-42 (3d Cir. 1975); *United States v. Julian*, 469 F.2d 371, 376 (10th Cir. 1972); *United States v. Bennett*, 460 F.2d 872 (D.C. Cir. 1972); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971).

The Solicitor General's reliance on *Hoffa v. United States*, 385 U.S. 293, 303-04 (1966); is misplaced. Brief for the United States, P. 26. Because Hoffa was neither in custody nor under court order to talk to the government informant, the Self-Incrimination Clause was not applicable.

terials and Cases 910-11 (1969). Courts have recognized that probationers often assume that statements made to their probation officers, including statements about criminal conduct, are in some way confidential. *Marrs v. State*, 452 A.2d 992, 994 (Md.App. 1982); *People v. Alston*, 431 N.Y.S.2d 82, 84 (App.Div. 1980). See, Brief for the United States, P. 27 n. 16.[12] In this case, the probation officer exploited her role as a counselor in order to obtain incriminatory statements. The misleading nature of the probation officer's conduct could not have occurred if the questioning had been done in the presence of impartial observers or if the respondent had been given some advance opportunity to talk to an attorney.

Another menacing interrogation technique described in *Miranda* concerned what an interrogator should do if a

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[12]It is not necessary for the Court to decide in this case whether all court ordered probation interviews are so non-adversarial in nature that some kind of *Miranda* warnings are required before statements made during such interviews can be used in a criminal trial.

It has long been established that a person may invoke the privilege against self-incrimination at a criminal trial without having previously asserted it if the government "obtained [the incriminating statements] by any direct or implied promises, however slight. . . ." *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963), quoting, *Bram v. United States*, 168 U.S. 532, 542-43 (1897). In this case, the probation officer told the respondent that the purpose of their meeting was "[t]o further discuss a treatment plan for the *remainder of your probation* . . ." Pet.App. C36 (Emphasis added). At the time of the meeting, the respondent had two years remaining on his probation. Pet.App. C31. The penalty for rape-murder in Minnesota is mandatory imprisonment. Minn. Stat. §609.185(2) (1974). By telling the respondent that the purpose of the meeting was to determine a treatment plan for the remainder of his probation, the probation officer implicitly represented that a new criminal prosecution would not result from discussing the murder. One does not participate in a treatment program as a condition of probation while serving time in prison.

person suspected of a crime indicates a desire to speak to an attorney. The police manuals referred to in *Miranda* suggest that the interrogator say he is only looking for the truth, and that if one tells the truth, then there is no need for an attorney. *Miranda*, 384 U.S. at 454. In this case, after the respondent said that he felt like calling an attorney, the probation officer told him that he would have to contact an attorney outside the probation office because now she wanted to talk about treatment. Pet.App. C16. The message communicated was that the respondent did not need an attorney but only needed to speak the truth.

By telling the respondent that he could not call a lawyer, the probation officer effectively prohibited the respondent from exercising his privilege against self-incrimination. "The assertion of a testimonial privilege . . . often depends upon legal advice from someone who is trained and skilled in the subject matter. . . ." *Maness v. Meyers*, 419 U.S. 449, 466 (1975)." There is no legally significant distinction between a probation officer telling a probationer that he cannot call a lawyer and a judge telling a witness that he cannot assert the privilege against self-incrimination. In either case, any resulting statement constitutes compelled testimony in its "most pristine form." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

This case contains all the essential elements which formed the basis of the Court's decision in *Miranda*. A government official deliberately used the government's compulsory processes to elicit incriminatory information from an individual in the absence of impartial ob-

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[13]One does not forfeit his legal rights when acting in reliance upon false legal advice given by a government official. *Van Moltke v. Gillis*, 332 U.S. 708, 727 (1948) (Frankfurter, J., concurring).

servers and without providing any opportunity for the individual to consult with a lawyer. This Court has never required an individual to assert the privilege under similar circumstances in order to invoke the privilege at a subsequent criminal trial.

E. The Decision By The Minnesota Supreme Court Will Serve The Best Interests Of The Probation System Without Undermining The Legitimate Interests Of Law Enforcement.

The Minnesota Supreme Court decision does not interfere with the proper functioning of law enforcement agencies. If law enforcement agencies need to use the court's compulsory processes to investigate criminal conduct, then the grand jury system is available. Law enforcement agencies should not and cannot look to the probation system to gather evidence for criminal trials. *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975). Compare, *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975).[14]

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[14]The Administrative Office of the United States Courts has the following guidelines with respect to disclosures by probation officers to law enforcement agencies:

> Generally, disclosure to [law enforcement] agencies should only be with respect to providing identifying information from the record, such as an individual's location, handwriting exemplars, or information relating to possible risk law enforcement officers may incur when investigating the individual in question. *The inquiring law enforcement agency should clearly understand the disclosure of information is for investigatory purposes, not evidentiary.*
>
> Self-incriminating statements made in the routine course of probation business, made without "Miranda" warnings may be used in probation revocation hearings. *The focus should be on obtaining this information for the probation revocation hearing rather than for further criminal prosecution.* If evidence of further criminal

The Solicitor General argues that the Minnesota Supreme Court decision undermines the trust relationship which is a necessary part of the probation system. It is suggested that the court's decision will encourage probation officers to give unnecessary *Miranda* warnings which would "discourag[e] probationers from viewing probation officers as counselors with whom they can discuss their problems. . . ." Brief for the United States, P. 27. From there, the Solicitor General argues that the Fifth Amendment rights of probationers should be limited. With limited Fifth Amendment rights, probationers would be more likely to make incriminatory statements to their probation officers which could later be used against them in criminal trials. The institutional needs of the probation system are supposed to justify that result. Brief for the United States, P. 28-32.

The Minnesota Supreme Court decision will not result in probation officers giving probationers unnecessary *Miranda* warnings. When a probation officer receives information indicating that a probationer has engaged in other criminal conduct, the probation officer can give that information to the appropriate law enforcement authorities.[18] The matter can then be handled like any other crimi-

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activity exists, with the permission of the court, an independent investigation may be requested of a law enforcement agency. If general background information is needed by a law enforcement agency it should be given to them with the consent of the probationer. Volume X, Guide to Judiciary Policies and Procedures, P. 4-34, 35 (Emphasis added).

[18]The only exception to that would be in a case such as this where the probation officer would have violated federal confidentiality laws had she gone to the police with the information she received from Alpha House. The counselors at Alpha House may disclose the content of a probationer's statements made during treatment to a probation officer

nal investigation. Under the federal probation system and under the probation system envisioned by the Minnesota Supreme Court, when a probation officer asks a probationer questions about other criminal conduct, the purpose of those questions will only be to determine whether to further regulate or revoke probation. Brief for the United States, P. 27 n. 16. *Miranda* warnings are not required for that purpose. Pet.App. A7-8; Note 14, *supra*. It will only be in those rare cases when a probation officer wants to preserve the evidentiary value of a probationer's statements that the probation officer must advise a probationer of the privilege against self-incrimination.[16]

This Court has held that the institutional needs of a prison system justify reasonable restrictions on some constitutional rights of prisoners. *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979); *Jones v. North Carolina Prisoner's Labor Union*, 433 U.S. 119, 125 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Price v. Johnston*, 334 U.S. 266, 285 (1948). But cf., *Mathis v. United States*, 391 U.S. 1 (1968). The institutional needs of a probation system are distinguishable from the institutional needs of a prison system.

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but cannot disclose such statements to the police. A probation officer can use those statements to regulate or revoke probation but a probation officer cannot use those statements to "initiate or substantiate" a criminal investigation. 21 U.S.C. §1175; 42 U.S.C. §4582; 42 C.F.R. §§2.39, 2.63. See, Pet.App. B15-16. In order for treatment facilities like Alpha House to be effective, patients must be able to speak freely and without fear of reprisal. Congress has determined that it is more important to have patients speak freely during treatment than it is to use treatment facilities as sources for criminal investigations.

[16]After making that advisory, a probation officer could also advise a probationer that cooperation with the authorities may lead to more favorable treatment. A statement made for that reason by a probationer who knows his legal rights is not inadmissible at a criminal trial. *Fare v. Michael C.*, 442 U.S. 707, 727 (1979).

There is no dispute that a necessary and proper role for a probation officer is to be a counselor to the probationer. *Gagnon v. Scarpelli*, 411 U.S. 778, 783-85 (1973). In order for the probation officer to fulfill the role of a counselor, the probation system must have at its foundation a trust relationship between the probationer and the probation officer. Mangrum, *The Humanity of Probation Officers*, 36 Fed.Prob. 47 (June 1972). If a probation officer exploits the role of a counselor to obtain incriminating statements which are used at a criminal trial, then the probation officer undermines the foundation of trust in the probation system. In *People v. Parker*, 82 A.D.2d 661, 667 (App.Div. 1981), aff'd., 57 N.Y.2d 815 (1982), a case decided in the context of the parole system, the court said:

> [T]he use of statements made by a parolee to his parole officer as evidence in a criminal trial against the parolee disrupts and destroys the confidence and trust which must inevitably inhere in the relations created by the parole system. The parole system presupposes the rehabilitation of the offender and must be built on the frank communication of advice and information between parolee and his supervisor, and that relationship will be damaged beyond repair if the indispensible pillar of candid exchange is undermined.

A probation officer is an official representative of the judiciary. The judicial branch of government has as its most important function the protection of constitutional rights. The holding of the Minnesota Supreme Court protects the integrity of the judicial branch of government and the trust relationship essential to the probation system.

II.

A PROBATIONER INVOKES THE PRIVILEGE AGAINST SELF-INCRIMINATION BY TELLING HIS PROBATION OFFICER THAT HE WANTS TO CALL AN ATTORNEY WHEN THE PROBATION OFFICER IS ALREADY ON NOTICE THAT THE INFORMATION SHE SEEKS TO ELICIT FROM THE PROBATIONER WILL INCRIMINATE THE PROBATIONER WITH RESPECT TO A NEW CRIMINAL OFFENSE.

The Self-Incrimination Clause protects probationers against independent criminal prosecutions to the same extent as any other person. Cf. *Mathis v. United States*, 391 U.S. 1 (1968). When an individual pleads guilty to a criminal offense, he waives the privilege only with respect to that offense. *United States v. Pierce*, 561 F.2d 735, 738 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir.), cert. denied, 409 U.S. 684 (1972). An individual on probation may legitimately assert the privilege in order to protect himself against new criminal prosecutions. Cf. *Roberts v. United States*, 445 U.S. 552, 559 (1980).[17]

[17]Recognition of this fundamental principle will not cause the demise of the probation system. A probation officer can compel nonincriminatory information from a probationer. Frivolous assertions of the privilege need not be honored by a probation officer and can be punished like any other contemptuous conduct. While the Court has not yet ruled on this issue, it may be permissible to draw an adverse inference at a revocation hearing when a probationer legitimately asserts the privilege. See, *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976). This would satisfy the concerns expressed by Judge Frankel in *United States v. Manfredonia*, 341 F.Supp. 790, 794-95 (S.D.N.Y.), aff'd., 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972). See, Brief for the United States, P.29-30 n.18.

The Self-Incrimination Clause limits the power of the government to use its compulsory processes to obtain testimony from an individual when the government has notice of two things: (1) that the testimony it seeks will incriminate the individual; and (2) that the individual objects to the government seeking that testimony. *Garner v. United States*, 424 U.S. 648, 655 (1976); *Emspak v. United States*, 349 U.S. 190, 203 (1955) (Harlan, J., dissenting). Sufficient notice is the key feature to an assertion of the privilege. *Quinn v. United States*, 349 U.S. 155, 164 (1955).[18]

A person need not have the knowledge or the vocabulary of a lawyer in order to invoke the protections of the Self-Incrimination Clause. The privilege is asserted "[i]f an *objection* to a question is made *in any language* that a [government official] may reasonably be expected to understand as an attempt to invoke the privilege. . . ." *Quinn*, 349 U.S. at 162-63 (Emphasis added). See, *Miranda*, 384 U.S. at 444-45 (can assert the privilege "in any manner"). *United States v. Goodwin*, 470 F.2d 893, 902 (5th Cir.), cert. denied, 411 U.S. 969 (1972) ("even the most feeble attempt to claim a Fifth Amendment privilege must be recognized.") In determining whether the privilege

[18]The trial court fundamentally erred by discussing the respondent's request for a lawyer solely as a part of a voluntariness analysis. Pet.App. B13-14. In order to assert the privilege, it is not necessary to engage the government in a battle of wills. The respondent testified that after he asked to call a lawyer, the probation officer "seemed . . . kind of angry and frustrated." Pet.App. C26. It would be unrealistic to expect the respondent to further persist in asserting his rights. A probationer perceives his freedom as being dependent upon having a good relationship with his probation officer. If the respondent had continued to ask for a lawyer, then, from the respondent's perspective, he would have impaired that relationship and jeopardized his freedom.

has been asserted, the focus should be on the words uttered by the individual and not on the subjective interpretation given to those words by the government official. *Quinn*, 349 U.S. at 162-63; *White v. Finkbeiner*, 611 F.2d 186, 190 (7th Cir. 1979), cert. denied, 424 U.S. 970 (1980), remanded other grds., —— U.S. ——, 101 S.Ct. 3000 (1981). But see, Pet.App. B5. If the words uttered by the individual are equivocal or ambiguous, then it is the duty of the government official to clarify whether the individual is attempting to assert the privilege. *Quinn*, 349 U.S. at 164; *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979).

A request for a lawyer during custodial interrogation is *per se* an invocation of the privilege against self-incrimination. *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The reason for this "rigid rule" is that "the lawyer is the one person to whom society as a whole looks as the protector of . . . legal rights . . ." *Id.* In any proceeding involving the government's compulsory processes, a lawyer's advice is "an integral part of the protection accorded . . . by the Fifth Amendment." *Maness v. Meyers*, 419 U.S. 449, 468 (1975). A government official who has the power to compel testimony cannot arbitrarily deny an individual's request to consult with a lawyer. *Id.* at 472 (Stewart, J., concurring); See, *United States v. Mandujano*, 425 U.S. 564, 582 (1976) (Burger, C.J., plurality).

In this case the probation officer had advance knowledge that the answers to her questions about the murder would incriminate the respondent. She also knew that the respondent wanted to call a lawyer before discussing the

murder.[19] At that point, the notice requirements of the Self-Incrimination Clause were satisfied. The probation officer's subsequent interrogation exceeded the limits of her constitutional authority.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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May 1983

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[19]It was sufficient notice for the respondent to say that he "felt" like calling an attorney. *Maglio v. Jago*, 580 F.2d 202, 203 (6th Cir. 1978) ("maybe I should have an attorney"); *United States v. Prestigiacomo*, 504 F.Supp. 681, 682 (E.D.N.Y. 1981) ("maybe it would be a good idea to have a lawyer"); *Wentela v. State*, 290 N.W.2d 312, 316 (Wisc. 1980) ("I think I need an attorney"); *People v. Tranbert*, 608 P.2d 342, 346 (Colo. 1980) ("I think I need to see an attorney"); *State v. Blakney*, 605 P.2d 1093, 1097 (Mont. 1979) ("Maybe I should have an attorney"). See Note 9, *supra*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE MINNESOTA CHIEFS OF POLICE ASSOCIATION IN SUPPORT OF PETITIONER

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Thomas J. Johnson, County Attorney, and Robert H. Lynn, Assistant County Attorney, Hennepin County, Minneapolis, Minnesota, Counsel for Petitioner, hereinafter called "State", and Mark S. Wernick, Attorney-at-Law, Minneapolis, Minnesota, Counsel for Respondent, hereinafter called "defendant". Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-eight times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

THE MINNESOTA CHIEFS OF POLICE ASSOCIATION, is a not-for-profit Minnesota association and consists of over 300 members who are Minnesota police chiefs and senior law enforcement executives. It seeks to represent in our courts the concern of police administrators with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their efforts to protect public safety.

Amici's interest in the instant case arises from the compelling constitutional and policy questions pertaining to the routine functions of probation officers as they relate to the duties and responsibilities of other criminal justice and govern-

mental officials who are affected by the decision and opinion of the court below reported as *State* v. *Murphy*, 324 N. W. 2d 340 (Minn. 1982). The Supreme Court of Minnesota held that a probationer (the defendant) who was required to meet with his probation officer and to answer her questions, should have been warned of his Fifth Amendment privilege prior to the beginning of her questioning regarding a matter of an incriminating nature, and that the failure to give such warning barred the admission of the probationer's answers at a subsequent criminal trial, even though he was not in custody within the purview of *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Amici believe that the ruling of the court below is a wholly unwarranted extention of the principles embodied in the Fifth Amendment. The ruling is also an example of the confusion and uncertainty that exist in the law of interrogation as a result of this Court's decision in *Miranda*.

ARGUMENT

THIS COURT SHOULD CLEAR AWAY THE INCOMPREHENSIBLE DISTINCTIONS AND CONFUSION EXISTING IN THE RULES FOR ROUTINE QUESTIONING BY CRIMINAL JUSTICE AND OTHER GOVERNMENT OFFICIALS AND ADOPT A RULE FOUNDED UPON THE ORIGINAL PURPOSE AND INTENT OF THE FIFTH AMENDMENT THAT CAN BE UNDERSTOOD AND APPLIED BY ALL SUCH OFFICIALS.

Americans for Effective Law Enforcement, Inc. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the **International Association of Chiefs of Police, Inc.**, and other national and state law enforcement groups. Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law, although we fully agree with the legal analysis submitted by the State in this case. We confine our brief basically to a suggested resolution of the perennial dilemma caused by the intolerable confusion that confronts law enforcement and other officials as they must determine when warnings of Fifth and Sixth Amendment rights must be given before routine questioning of persons they come in contact with in the performance of their duties.

We start with the holding of the Minnesota Supreme Court:

> Because of the compulsory nature of the meeting, because defendant was under court order to respond truthfully to his [probation officer's] questions, and because the [probation officer] had substantial reason to believe that defendant's answers were likely to be incriminating we

> conclude that, as a matter of federal constitutional law, any failure on defendant's part to claim the [Fifth Amendment] privilege [against compelled self-incrimination] when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that as a matter of due process, the [probation officer] should have warned defendant of his privilege against self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of defendant's confession at his trial.

324 N. W. 2d at 344.

We note initially that the court did not expressly find that the defendant was in custody for purposes of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Thus, the warning ritual required by that case was apparently not necessary here, and the court below could have found that in the absence of *Miranda*-type custody no such warnings were required. The majority of the courts that have considered this issue have ruled that non-custodial statements made by a probationer or parolee to his probation or parole officer may be used in subsequent proceedings even though *Miranda*-style warnings were not administered by the officer. *See, e.g., United States* v. *Miller*, 643 F. 2d 713 (10th Cir. 1978); *United States* v. *Holmes*, 594 F. 2d 1167 (8th Cir. 1979); *People* v. *W.*, 24 N. Y. 2d 732, 249 N. E. 2d 882 (1969); *State* v. *Johnson*, 87 S. D. 43, 202 N. W. 2d 132 (1972); *People* v. *Alston*, 79 Misc. 2d 586, 360 N. Y. S. 2d 768 (1974); *State* v. *Roberts*, 14 Wash. App. 727, 544 P. 2d 754 (1976); *People* v. *Parker*, 100 Misc. 2d 800, 421 N. Y. S. 2d 561 (1979).

The court below appears to have based its warning requirement upon the Due Process Clause of the Fifth Amendment rather than facially upon this Court's Fifth and Sixth Amendment warnings requirement as established in *Miranda*. It does, nevertheless, establish a new warning requirement for probation officers—and possibly other government officials—and may be fairly construed to import at least one-half of the standard *Miranda* warning and waiver requirement founded upon the Fifth Amendment.

Amici contend that the holding of the court below is unwarranted under the Fifth Amendment and cannot be supported on the basis of the Fifth Amendment jurisprudence of this Court. We leave to the State of Minnesota the discussion of the caselaw demonstrating that this is so. We merely point out that this new rule totally misconceives the role of the probation (or parole) officer in our criminal justice system, and jeopardizes the roles of other government officials as well.

Probation and parole officers are not police officers. Their primary goal is not the detection and prosecution of crime. It is the rehabilitation of their clients. Imposition of a warning requirement when questioning their clients in non-custodial settings such as that in the instant case will all but hobble this goal and render their role in the criminal justice system meaningless, turning them into an adjunct of the police and the prosecutor. Although *amici* have frequently supported the interests of police and prosecution in this Court, we are compelled to state that casting the probation or parole officer in this new role will lead to the demise of a useful and beneficial element of the corrections component of our criminal justice system.

Other courts have had no difficulty in recognizing these principles and in fashioning rules that do not require probation officers to be considered as police officers. For example, in *Latta* v. *Fitzharris*, 521 F. 2d 246 (9th Cir. 1975), the court ruled that where a parolee was arrested by his parole officer with a pipe full of marijuana in his hand, a warrantless search of the parolee's home by the parole officer, and police officers accompanying him, was reasonable. Because of the special function and role of the parole officer in our criminal justice system the court declined to apply the Fourth Amendment Exclusionary Rule to his search and held that the admissibility of evidence obtained as a result of such a search was not limited to parole revocation proceedings. The court stated, at 521 F. 2d 250:

> The fact that crimes are detected during the admistration of the parole system does not convert what is essen-

tially a supervisory and regulatory program into a subterfuge for criminal investigations.

The purposes of the parole system give the parole authorities a special and unique interest in invading the privacy of parolees under their supervision. In order to fulfill his dual responsibilities for helping the parolee to reintegrate into society and evaluating his progress, and for preventing possible further anti-social or criminal conduct by the parolee, it is essential that the parole officer have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other persons, and what he is doing, both at home and outside it. It is equally important that this information be kept up to date. *See* R. Dawson, *supra* at 326, 332-33; Newman, Concepts of Treatment in Probation and Parole Supervision, 25 Fed.Prob. 11 (March 1961); Note, Observations on the Administration of Parole, 79 Yale L.J. 698, 699-700 (1970). Much of this information can be obtained by methods which necessitate little or no invasion of the parolee's privacy, such as interviews with the parolee himself or with his employer, family, or friends and visits to his house. However, these techniques have inherent limitations.

. . . although the conditional nature of the parolee's release does not place him at the unfettered mercy of the parole authorities, he is justifiably subjected to restrictions not applicable to the population as a whole. Many of these restrictions relate to matters which the parolee might otherwise be entitled to preserve as private.

The principal protection against abuse of this authority is the "helping" function of the parole officer's job, and the training that he has received to fit him for that job. A good parole officer does not regard himself as a policeman.

The court concluded that for these reasons ". . . the propriety of warrantless searches by parole officers pursuant to proper conditions affixed to the status of parole cannot be determined by automatic reference to the law of ordinary and administrative searches." 521 F. 2d at 251.

The Minnesota Supreme Court itself had previously recognized the unique role of probation officers and the need to apply different standards to the performance of the probation function. In *State* v. *Earnest,* 293 N. W. 2d 365 (Minn. 1980), the court held that a defendant's Fourth Amendment rights were not violated by a warrantless probable cause search of his residence by his probation officer during a house visit. The Minnesota Court stated, at 293 N. W. 2d 368:

> It has been recognized that the relationship between a probation officer and his probationer is a special one. *Latta* v. *Fitzharris,* 521 F. 2d 246, 249 (9th Cir.), *cert. denied,* 423 U.S. 897, 96 S. Ct. 200, 46 L. Ed. 2d 130 (1975). The efficient functioning of the probation system requires the probation officer to work toward rehabilitation of one convicted of a crime while at the same time, protecting the public interest. *State* v. *Tarrell,* 74 Wis. 2d 647, 652, 247 N. W. 2d 696, 700 (1976). In order to accomplish these ends, the probation officer must have thorough up-to-date knowledge of the probationer's personal habits, relationships, and activities. See *Latta* v. *Fitzharris,* 521 F. 2d at 249. Although we agree that probation searches fall within the ambit of the Fourth Amendment, and must therefore comport with a standard of reasonableness, see *Latta* v. *Fitzharris,* 521 F. 2d at 248—9; *People* v. *Anderson,* 189 Colo. 34, 37, 536 P. 2d 302, 304—05 (1975), **we also recognize that, because of this special relationship between the probation officer and probationer, the law relating to probation searches cannot be strictly governed by automatic reference to ordinary search and seizure law.**

The court added, at p. 369,

> **. . . that putting onerous restrictions on the ability of a probation officer to protect the public interest may actually**

> deter courts from a judicious use of probation in the future in marginal cases. A court's uncertainty as to the ability of a probation officer to supervise his probationers closely may tip the balance when it comes to sentencing.

We ask this Court to recognize the foregoing compelling policy considerations, which are equally applicable in the area of Fifth Amendment protections, and to rule that due process does not require probation officers to give Fifth Amendment warnings in the circumstances involved in the instant case. As Justice Yetka noted in his dissent in the case now before this court, at 324 N.W. 2d 345:

> . . . the privilege against self-incrimination was [not] intended to apply to the situation presented here. The defendant is a parolee who would be serving a prison sentence but for that fact. One of the conditions of his parole is to meet periodically with a probation agent. The probation officer's function is to work towards rehabilitating the parolee while protecting the public interest. *State* v. *Earnest,* 293 N. W. 2d 365 (Minn. 1980). To do this job, the agent must be aware of all of the parolee's problems, both past and present. It is entirely reasonable for the agent to ask a parolee if he has had prior problems with the law. If the agent in this case had gone first to the police before talking with the defendant, she would have destroyed her credibility and severely impaired her ability to assist the defendant.

Amici point out that a contrary ruling will have serious consequences for routine questioning conducted by other criminal justice personnel and other government officials as part of their regular duties. For example, will it be necessary for welfare caseworkers to give Fifth Amendment warnings when questioning welfare recipients concerning eligibility issues? Child welfare caseworkers questioning parents concerning potential child abuse? License examiners questioning applicants? Assessors questioning property owners concerning home improvements? Bank examiners questioning bank employees? Building inspectors questioning property owners about possible code violations? EPA officials questioning plant managers?

Voting judges questioning voters concerning credentials? The list of governmental officials potentially affected by the Court's ruling in the instant case is impressive.

In order to put an end to the intolerable confusion already existing in this area of Fifth Amendment law we ask this Court to adopt a clear rule to the effect that Fifth Amendment warnings are not required whenever probation, parolee, and other non-police governmental officials question persons in the routine, ordinary pursuit of their statutory or customary duties. To the extent that the present confusion results, at least in part, from the Court's decision in *Miranda* v. *United States*, 384 U. S. 436 (1966), we join with the suggestion of the Minnesota Supreme Court in the instant case that there must be a solution in this area of jurisprudence other than the exclusion of trustworthy evidence. 324 N. W. 2d at 344. To the extent that *Miranda* may indeed be the cause of such confusion and overreaction as represented by the decision in the instant case, we call for a fundamental reexamination of the rationale of that 5-4 decision, either in this case or another in the future that squarely presents the issue of the continued viability of that decision. *See*, Inbau, *Over-Reaction—The Mischief of Miranda* v. *Arizona*, 73 J. Crim. L. & C. 797, 809 (1982).

CONCLUSION

Amici respectfully submit that the decision of the Supreme Court of Minnesota should be reversed on the facts and law, and on the basis of sound judicial policy.

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1982

STATE OF MINNESOTA,

Petitioner,

versus

MARSHALL DONALD MURPHY,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

Brief of
The National Association of Criminal Defense Lawyers
As Amicus Curiae in Support of Respondent

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QUESTION PRESENTED

Whether when a probationer, under Court Order to be truthful to his probation officer and to report to his probation officer as directed, is interrogated by his probation officer about a prior crime and the probation officer knows that the answers will be incriminating and intends to pass the incriminating information on to the police, and the probationer requests an attorney which is denied, the request for counsel was an assertion of his Fifth Amendment privilege against self-incrimination so that statements made thereafter are inadmissible?

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ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

Brief of The National Association of Criminal Defense Lawyers As Amicus Curiae in Support of Respondent

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers was founded a quarter of a century ago to

promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, to promote proper administration of criminal justice and to encourage the integrity, independence and expertise of the criminal defense practitioner. The members of the Association are criminal defense lawyers who devote the major portions of their professional lives to defending persons accused of crimes.

This case involves incriminating statements made by a probationer to his probation officer without *Miranda* warnings and after the probationer had requested a lawyer. It is the position of the National Association of Criminal Defense Lawyers that the decision of the Minnesota Supreme Court that the incriminating statements were inadmissible, was eminently correct for several very sound reasons, but especially because the probationer's request for a lawyer was an assertion of his Fifth Amendment privilege against self-incrimination.

As attorneys involved in the defense of criminal cases, the primary interest of the membership of the Association is to insure that fundamental rights are recognized and afforded all persons, including a probationer being interrogated by his probation officer under the specific circumstances presented in this case. The key issue to be decided, and the point which the National Association of Criminal Defense Lawyers will discuss in this brief is that when Murphy requested an attorney, the questioning should have ceased until counsel was made available to him.

Counsel for the respective parties have given their consent to the filing of this Amicus Curiae brief. Their letters of consent are on file with the Court.

SUMMARY OF ARGUMENT

The rule requiring truthful answers to a probation officer's questions without benefit of counsel, do not apply when the probation officer uses his authority to interrogate the probationer about an uncharged crime predating the current probation and unrelated to it. When the probation officer began talking about the 1974 rape and murder which the probationer had discussed with a psychologist at his treatment program, the probationer became angry and said that he felt like calling a lawyer. He was told that he could speak with an attorney later, and the questioning continued. When the probation officer delivered this preemptive strike against the probationer's assertion of his rights, she thwarted any further attempt on his part to assert his rights. Just two months before, the probation officer wrote the probationer a letter stating that if he did not contact her she would make an immediate request for a warrant. She reinforced in his mind that she could have his probation revoked. The probationer knew that if he left the office he could have been arrested for violation of probation.

The Fifth Amendment, through the Fourteenth Amendment, prohibits the State from compelling a suspect in custody to incriminate himself without first giving an adequate warning of rights. Once the probationer requested counsel, he asserted his Fifth Amendment right to remain silent until counsel was made available. All of the elements which require giving *Miranda* warnings

are present in this case including that the investigation focused on the probationer; the probation officer was acting in a police capacity; the probationer was in custody in that his freedom was restricted, he was not free to leave; his statements were compelled in that he did not feel that he could refuse to answer the probation officer's questions; it is undisputed that *Miranda* warnings were not given; and there was no waiver of rights—in fact the probationer asked to speak with a lawyer, thus trying to assert his rights. The meeting which allegedly was to discuss "further treatment" for the probationer was an investigation into a seven year old crime.

The probation officer abandoned her traditional role and became a police interrogator, knowing that she would learn incriminating information from the probationer and give it to the police to make a case. The rehabilitation function was totally negated. The Minnesota Supreme Court held that the probationer should have been advised of his privilege against self-incrimination. This holding should be upheld, and this Court should find that the denial of the request made by the probationer during questioning to speak with an attorney, renders his statements made thereafter inadmissible under *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Miranda v. Arizona*, 384 U.S. 436 (1966). Cf. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

ARGUMENT

WHEN A PROBATIONER, UNDER COURT ORDER TO BE TRUTHFUL TO HIS PROBATION OFFICER AND TO REPORT TO HIS PROBATION OFFICER AS DIRECTED, IS INTERROGATED BY HIS PROBATION OFFICER ABOUT A PRIOR CRIME AND THE PROBATION OFFICER KNOWS THAT THE ANSWERS WILL BE INCRIMINATING AND INTENDS TO PASS THE INCRIMINATING INFORMATION ON TO THE POLICE, AND THE PROBATIONER REQUESTS AN ATTORNEY WHICH IS DENIED, THE REQUEST FOR COUNSEL WAS AN ASSERTION OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION SO THAT STATEMENTS MADE THEREAFTER ARE INADMISSIBLE.

References in this brief to documents in the original record and to transcripts of proceedings before the trial court will be made as they appear in the Appendix to the Petition for Certiorari filed by the State of Minnesota, by appendix letter and page number.

The facts are adequately set forth in the brief of Respondent and will not be repeated herein with the exception of the following: The order placing Murphy on probation required him to (C-32): "Be truthful to your Probation Officer in all matters" and "Report to your Probation Officer as directed."

> Should defendant violate any of the conditions herein specified, or should it hereafter satisfactorily appear that sentence should be enforced, said stay may at any time prior to expiration [be] revoked and sentence executed.

* * *

In July of 1981, it came to the probation officer's attention that Murphy was no longer in treatment. She sent him a letter asking him to contact her immediately (C-7). The letter stated that failure to do so would result in an *immediate request for a warrant* (C-35). Murphy called and they arranged a meeting (C-8). At that meeting, Murphy said that he did not want to continue treatment. The probation officer acquiesced and said that she *would not seek to have Murphy's probation revoked on that ground alone* because he was employed and seemed to be doing well in other areas (C-14). Murphy was well aware of his probation officer's power to request a warrant and revoke his probation.

In September, the probation officer learned from a psychologist at Murphy's treatment program that Murphy admitted to the commission of a rape and murder in 1974 (C-15). The probation officer sent Murphy a letter stating that she wanted to discuss his further treatment plans. If he did not respond, his conditions of probation would have been violated (C-25-27):

> Q. When you went into the office then on September 28, what did you think you were going to be talking about?

A. Further treatment plans.

Q. What was your reaction when your probation officer told you about the information she had received that we talked about yesterday?

A. I was, you know, shocked and angry.

Q. Did the subject of an attorney come up?

A. I asked her if—well, I said I feel like I should have an attorney present.

Q. Why did you feel like you should have an attorney present?

A. Well, the subject matter we were talking about, little flags went up in my head, and you know, I felt like I needed an attorney at the time.

Q. And what was Mara's demeanor right after you said that?

A. She seemed like kind of angry and frustrated.

Q. What did she say to you?

A. She said we didn't have to worry about having an attorney here now. We had more important things to talk about.

Q. What was that she wanted to talk about?

A. About the case at hand.

Q. Did you feel you were free to leave at that time?

A. No. I didn't.

Q. What did you think would happen if you left at that time?

A. Well, if I would have got up and walked out of the office, I would have been violated. [Conditions of probation would have been considered violated.]

Q. Did you want to talk to her about further treatment at that time?

A. No.

* * *

Q. Why did you then continue to talk to her at that time?

A. She wanted to talk to me.

* * *

The probation officer had already discussed with her supervisor the information which she received from the psychologist, and she knew, before Murphy came to her office, that she was going to question Murphy about the crimes and pass the information on to the police (C-15, 16). She did not advise him of this before questioning him (C-24). Her directive for Murphy to report to her office was couched in terms of "further

treatment" (C-16). The probation officer became a de-facto police interrogator, rather than a social worker concerned with the rehabilitation of her charge. Murphy testified that it did not occur to him that the probation officer would take the information to the police, and she did not tell him that until after they had finished their discussion. At the time they started talking, Murphy did not know that he had the right to remain silent, or the right to consult with an attorney (C-28).

Based on the foregoing facts, the Minnesota Supreme Court held (A-10):

> Because of the compulsory nature of the meeting, because defendant was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that defendant's answers were likely to be incriminating, we conclude that, as a matter of federal constitutional law, any failure on defendant's part to claim the privilege when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that, as a matter of due process, the agent should have warned defendant of his privilege against compelled self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of defendant's confession at his trial.

A. THE PROBATION OFFICER ABANDONED HER ROLE AND CONDUCTED A POLICE INTERROGATION DURING WHICH MURPHY WAS ENTITLED TO COUNSEL.

Ordinarily, the probation officer's function is to investigate the circumstances surrounding the offense and the background of the probationer, as well as to supervise the probationer's lifestyle while on probation. *Miranda* warnings usually are not required to be given by the probation officer, but as the Minnesota Supreme Court recognized, special aggravating circumstances warrant an exception in this case.

The probation officer was acting as an officer of the State when she compelled Murphy's attendance in her office on September 28, 1981. She confronted him with the information from the psychologist, and proceeded to engage in questioning obviously for the purpose of eliciting incriminating information, knowing that she would share that information with the police. This was not just routine questioning as an adjunct to her normal duties of probation supervision. It was not an ordinary interview to learn the background of the probationer, nor was it an investigation into some incident occurring during the period of probation which could lead to revocation of probation.

Certainly, effective supervision requires questioning probationers about their present activities and lifestyle while on probation. Sometimes that questioning may lead to incriminating information. The point is well taken, that requiring *Miranda* warnings before every contact between probation officer and probationer would hamper the administration of probation supervision.

But it is beyond the scope of probation supervision to investigate pre-probation crimes with intent to prosecute the probationer. See *Estelle v. Smith*, 451 U.S. 454 (1981).

When the probation officer assumed the role of police investigator, the probation relationship evaporated and an interrogator-suspect relationship developed. To hold as the State urges the Court to hold, would allow the police to use probation officers to do their questioning when a probationer is suspected of a crime. Due to the trust and confidence implicit in the relationship, the probation officer could more easily obtain a confession without having to give *Miranda* warnings. The probationer would have to appear as directed and would have to answer all questions truthfully, knowing that although he may be physically "free to leave", if he does leave, the probation officer will have him arrested and have his probation revoked.

Just as the decisions in *Escobedo v. Illinois, supra*, and *Miranda v. Arizona, supra*, 384 U.S., 477, are "not intended to hamper the traditional function of police officers in investigating crime", neither will approval of the decision of the Minnesota Supreme Court in this case hamper the normal function of probation officers to supervise and rehabilitate probationers.

To summon Murphy to the office using the subterfuge of discussing "further treatment" to elicit a confession to a pre-probation crime is reminiscent of the schemes employed by the police to throw the suspect off guard by assuming a non-adversary position. See White, *Police Trickery in Inducing Confessions*, 127 Pa.L.R. 581, 599, 628 (1979). The notion of a state agent instructing a probationer to report to the office to discuss further

treatment and then making him confess to a crime, is unacceptable. She induced Murphy to lower his guard. She took him by surprise and exacerbated his confusion and bewilderment by forcing him to discuss the rape and murder in the context of its relationship to the offense for which he was on probation.

In *Leyra v. Denno*, 347 U.S. 556 (1954), defendant was induced by a state-employed psychiatrist to confess to the murder of both of his parents. Defendant had been suffering from a painful sinus attack and thought the doctor was a general practitioner brought in to give him medical relief. This may be analogized to the way Murphy was thrown off guard when the probation officer told him he must discuss this crime in terms of further treatment. The probation officer was acting on behalf of the State, not in the best interest of Marshall Murphy.

In *Fare v. Michael C.*, 442 U.S. 707, 720-721 (1979), in dicta, the Court explained the roles of probation officers and their dual responsibilities to probationers and to the state:

> . . . the probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe the [probationer] under his supervision.

* * *

> . . . it cannot be said that the probation officer is able to offer the type of independent advice that an accused would expect from a lawyer retained or assigned to assist him during questioning. Indeed, the probation officer's duty to his employer in many, if not most cases would conflict sharply with the interests of the [probationer]. For where an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be "exercising" [his] good professional judgment . . . to protect to the extent of his ability the rights of his client, *Miranda v. Arizona*, 384 U.S. at 480-481, a probation officer would be bound to advise his charge to cooperate with the police.

Probation officers, like police officers, enjoy broad power to exercise coercive force over individuals under their supervision, including the power both to arrest and to release those over whom they have jurisdiction. Probation officers have ". . . been armed with the power to recommend or even to declare revocation." *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973). The probation officer is an extension of the judiciary's authority to set the conditions under which particular individuals lead their lives and of the executive's authority to coerce obedience to those conditions. The probation relationship has an almost familial kind of privacy and confidentiality attached to it. The probation officer is an authority figure. In that capacity, the probation officer has the power to compel a probationer to confess and to do so involuntarily.

In July of 1981, when the probation officer learned that Murphy was no longer in treatment, she wrote him a letter asking him contact her immediately. His failure to do so would have resulted in an *immediate request for a warrant.* When they met in July, the probation officer told Murphy that she would not seek to have his probation revoked because he was employed and was doing well. This served to reinforce in Murphy's mind the awesome power held over him by the probation officer to request a warrant and revoke probation at her discretion. She had police power over Murphy. Her questioning was an interrogation and he was in custody in that he was instructed to come to the office or be arrested. He was in a vulnerable position. She had threatened him once before with a warrant, and he knew what she could do to him if he failed to cooperate.

It is the extent of the power which the probation officer held over Murphy which made this interrogation even more menacing than one in a police station. Interrogation in police custody is, without doubt, menacing. A police officer wields great power over his suspect when he wants answers to questions. Although the power of the probation officer is different from the direct, immediate, primitive powers of a police officer interrogating a suspect in his squad car at 3:00 a.m., it is as devastating. The probation officer could allow Murphy to remain free on probation, or she could have him arrested and his probation revoked, depending upon whether he cooperated to her satisfaction. This was prominent in his mind. Thus, the interrogation here was more menacing that it would have been in a police-suspect context. Cf. Y. Kamisar, *Police Interrogation and Confessions*, at 195 (1980).

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Court ruled that incriminating statements made by several police officers were improperly used to convict the officers of conspiring to obstruct justice. When the questioning commenced, the officers were advised that they would be fired if they refused to answer. As Mr. Justice Douglas wrote at 385 U.S. 497-8:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda . . . is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. (citations omitted)
>
> * * *
>
> **The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. 385 U.S. at 500.**

The application of this holding to the instant situation is plain. *Garrity* dealt with the loss of employment as a penalty for refusal to answer. Murphy was faced with immediately being taken into custody and having his probation revoked for failure to "be truthful to [his]

probation officer in all matters". It is ineluctable that the loss of a job while a dreadful penalty for refusing to answer questions, is far outweighed by the loss of freedom. See also *Spevack v. Klein*, 385 U.S. 511 (1967).

This case may be distinguished from *Oregon v. Mathiason*, 429 U.S. 492 (1977). Mathiason was not required by court order to go to the state patrol office in response to the officer's note stating "I'd like to discuss something with you." Mathiason went voluntarily, but Murphy was required to meet with his probation officer or be in violation of conditions of probation. This was such restriction on Murphy's freedom as to render him "in custody" for purposes of *Miranda*. This case is also distinguishable from *Beckwith v. United States*, 425 U.S. 341 (1976). At least Beckwith was told that the investigation concerned possible criminal violations and that he could not be compelled to answer. Further, the interview was friendly and relaxed and took place at Beckwith's home. These facts do not obtain here.

Even inmates summoned to prison disciplinary hearings must be offered "whatever immunity is required to supplant the privilege" and cannot be requested to waive that immunity, if their testimony might incriminate them in later criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973). Compare *Baxter v. Palmigiano*, 425 U.S. 308, 319-20 (1976), in which an *adverse inference* could be drawn from an inmate's silence at prison disciplinary proceedings. Here, there was far more than inference; Murphy knew he would have to go to jail for his refusal to answer.

The probation officer held at least as much power over Marshall Murphy in this case, as the narcotics

officers held over Mark Royer at Miami International Airport in *Florida v. Royer*, 103 S.Ct. 1319 (1983). In *Royer*, all the officers held was Royer's airline ticket and his drivers license. This was found to constitute custodial interrogation under the totality of the circumstances approach. The probation officer held Murphy's freedom in her hands. In *Orozco v. Texas*, 394 U.S. 324, 326 (1969), the defendant was interrogated at the boarding house where he lived, in his own bed and in familiar surroundings. Still, he was not free to leave. The use of his incriminating admissions obtained in the absence of the required warnings was held to be "a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*". Ibid.

The probation officer was on ethically treacherous ground. It is unrealistic to expect that a probation officer can rehabilitate a sex offender if the offender cannot freely relate his background and personal history to the probation officer, knowing that what he says will be held in confidence; it is also unrealistic to expect that a sex offender can benefit from a treatment program if he has to fear that disclosures to a therapist will result in prosecution on criminal charges. Without the confidence of both the treatment program and the probation officer, the rehabilitation function cannot be successfully carried out. See, Stone, *The Tarasoff Decision: Suing Psychotherapists to Safeguard Society*, 90 Harv. L.R. 358 (1976). When the probation officer began investigating the crime, she should have advised Murphy of his rights and in any event, should have honored Murphy's request to speak with a lawyer.

To reverse the decision of the Minnesota Supreme Court will serve to give probation officers power which is destructive of rehabilitation and destructive of Fifth Amendment rights.

B. MURPHY'S REQUEST FOR AN ATTORNEY WAS AN INVOCATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

The trial judge recognized that Murphy asserted "that this request for counsel was an invocation of the privilege against self-incrimination" (B-6), but found that Murphy's request for a lawyer was made solely in the context of a civil suit for breach of confidentiality. The trial judge did not decide whether Murphy's reference to a lawyer constituted an assertion of the privilege. It found that Murphy was not in custody and that the confession was voluntary (B-6-14), but made no reference to any legal standards regarding what constitutes an assertion of the privilege under the self-incrimination clause.

The finding with respect to a civil suit was clearly erroneous. The Court made no finding about what Murphy's "real intent" was when he asked for a lawyer (B-13, 14):

> He now claims that he asserted a right to talk to an attorney, and whatever his real intent may have been, we are persuaded by the probation officer's testimony that he did not express that desire in any context other than a civil suit for the breach of confidentiality.

The trial court did not say that based upon all of the circumstances Murphy was only concerned about a civil suit. It was just "persuaded by the probation officer's testimony" that Murphy asked for a lawyer solely in the context of a civil suit. As the testimony

reflects, the only person in the courtroom who referred to a civil suit was the prosecutor (C-20-21):

Q. You indicated that at one point Marshall Murphy made mention of he ought to see a lawyer?

A. Yes.

Q. Am I correct that that was in the context,—Mr. Wernick: Objection, leading.

The Court: Well, it sounded like it would have been, but I guess we won't know unless he asks it. Well, go ahead and ask it.

By Mr. Lynn:

Q. Was that in the context of a civil lawsuit? Mr. Wernick: Well, objection, leading and a legal conclusion.

The Court: Well, I don't have the whole question before me.

Mr. Lynn: I will rephrase it, Your Honor.

By Mr. Lynn:

A. You indicated that Marshall Murphy became angry correct?

A. Correct.

Q. He said something about a lawyer, is that correct?

A. That's correct.

Q. Do you recall specifically what he said?

A. Yes, he said that he was so angry that the information about his admission to the rape and murder had been given to me that he felt like calling a lawyer. He felt that that violated his confidentiality.

The Minnesota Supreme Court made the following factual finding (A-3):

> The agent apparently opened the meeting by telling defendant about the information which she had received from the counselor and then said that she now felt that defendant needed treatment. Defendant became angry when he learned this. He stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney.

The Court specifically stated that it was not deciding whether Murphy asserted the privilege (A-9).

> We need not decide whether defendant in fact claimed the privilege in this case because we conclude that an exception must be made on the facts of this case to the general rule requiring a timely claim of the privilege.

The issue has been raised and preserved in the courts below, but it has not yet been addressed directly. It is an important question which should be decided by this Court.

Garner v. United States, 424 U.S. 648, 653-4 (1976), holds that the self-incrimination clause limits the power of the government to use compulsory process when the information sought is incriminatory in nature and the individual objects to the government seeking the information. A timely assertion of the privilege must be honored. *Garner, supra; Quinn v. United States*, 349 U.S. 155 (1955). The probation officer knew that the information she sought to elicit from Murphy was incriminating. The sole purpose for which she summoned him to her office was to obtain a confession to the crimes so that he could be prosecuted. This was clearly beyond the scope of the probation rules which appear to waive the right against self-incrimination. Even if the probation officer had advised Murphy of his rights, in order to limit her power to compel answers Murphy only had to put her on notice that he objected to being questioned about the murder. This is no battle of wills or game of semantics. When the right to call an attorney was asserted, that should have been the end of the questioning. First, Murphy expressed anger that she brought the subject up. He did not want her to know that he had admitted to committing a murder and did not want to discuss it. Second, he stated that he felt like calling a lawyer. At this point, the self-incrimination clause was invoked and the probation officer had no lawful authority to further question him about a substantive crime which would not be a violation of probation. In the alternative, the officer could compel answers if needed for a treatment plan, but not use the information against the probationer in a new prosecution.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court referred to the undisputed right under *Miranda* to remain silent and to be free of interrogation until

the defendant could consult with a lawyer; and in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 1884-5 (1981), the Court held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he was advised of his rights. Once having expressed a desire to deal with the police only through counsel, defendant is not subject to further interrogation by the authorities until counsel has been made available to him.

Asking for a lawyer is a stronger assertion of the privilege than merely invoking the right to remain silent. Compare *Edwards, supra*, to *Michigan v. Mosely*, 423 U.S. 96 (1975). In *Mosely*, defendant was readvised of his rights and questioned again; but when Edwards asked for a lawyer, questioning had to cease until counsel was made available.

The request for an attorney is *per se* an invocation of the Fifth Amendment privilege. In *Fare v. Michael C., supra*, the Court discussed the critical position held by lawyers in the legal system, and the unique ability of lawyers to protect the Fifth Amendment rights of their clients undergoing custodial interrogation (442 U.S. at 707):

> The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country . . . the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease.

It is, of course, the primary concern of the National Association of Criminal Defense Lawyers that persons accused of crimes being questioned in custodial situations, be accorded the right to speak with their attorneys. The presence of an attorney is the most effective means of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery of the State.

Murphy did invoke his right to counsel. Assuming he did not, the probation officer's comment that he would have to wait to speak with an attorney made it clear that he could not have one, even if he asked again. What the probation officer told Murphy was fatal to any incriminating statements he made.

C. THE PROBATION OFFICER MADE IT CLEAR TO MURPHY THAT HE COULD NOT HAVE AN ATTORNEY AND THAT HE HAD NO RIGHT TO REMAIN SILENT.

Murphy said he felt like calling a lawyer. The probation officer, angry and frustrated, said he did not "have to worry about having an attorney" at that time and that they "had more important things to talk about". This statement was the antithesis of advising him of his rights. The probation officer, in effect, told Murphy that he had no rights and could not assert any rights during the meeting (under penalty of alienating her to the extent that she would have his probation revoked). She delivered a preemptive strike, cutting off any possibility that Murphy would attempt to (further) assert his rights while he was in the office.

Telling Murphy that he had to discuss the rape and murder in the context of treatment and its relationship to the present offense was the equivalent of saying "You have no rights here now". Murphy was like the immunized witness in *New Jersey v. Portash*, 440 U.S. 450 (1979), whose statement was held to be involuntary because he was told that he could not call an attorney and thus, he had no Fifth Amendment right to remain silent.

Had the probation officer opened the meeting by telling Murphy that he could not see an attorney until after she finished questioning him, there would be no doubt that she was precluding any assertion by Murphy of his rights. When she said it in response to his request for counsel, she cut off any remaining defenses he might have tried to use to avoid making incriminatory statements. If, as we believe, he wanted an attorney to protect his Fifth Amendment rights, she thwarted this. Even if he asked for an attorney for purposes of a civil action for breach of confidence, she thwarted any later assertion of right to counsel or right to remain silent.

Assuming there was no absolute barrier in this situation against questioning without giving *Miranda* warnings, the course of events required the protection of Murphy's rights. He did not make an unsolicited visit to the office to volunteer the information. He was summoned to appear. When she confronted him with the information, he said he needed a lawyer. She said he could not see a lawyer (for any purpose) until he left her office. It would be unrealistic to expect him to assert his rights further. After all, the probationer is dependent on maintaining the good will of his probation

officer. She has complete control over him. She decides whether he remains free or goes to jail. If Murphy had *demanded* to speak with an attorney, after being told he would have to wait, he might well have lost her good will.

In *Quinn v. United States*, supra, 349 U.S., 161-2, the Court wrote that the privilege of self-incrimination is:

> ". . . a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions." Co-equally with our other Constitutional guarantees, the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure."

There is no value in having a Constitution if the government can prevent the people from knowing and exercising their rights under it.

> . . . no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. at 490. The existence of constitutional rights in a vacuum is worthless. It is their application and availability to individuals that impart meaning to them. Constitutional rights are of no value if the public is not aware and given benefit of them. A defendant cannot waive a right he does not know he has. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

CONCLUSION

The decision in *Miranda* transformed the climate of station house interrogation, putting an end to a sordid history marked by the use of trickery and torture as a means of coercing confessions against the human will. *Miranda* introduced a more civilized standard of interrogation. To recede even slightly from the standards set out in *Miranda*, will serve to encourage greatly those who would chip away at our Constitutional rights until they are effectively nonexistent. The National Association of Criminal Defense Lawyers is not suggesting that *Miranda* warnings must be given before every contact between probation officer and probationer. We appreciate the importance of probation as a viable alternative to incarceration. We do contend, however, that under the circumstances of this case, *Miranda* warnings were required to be given, and when Murphy requested to speak with counsel, questioning should have ceased, as he had asserted his Fifth Amendment rights. The decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted this 24th day of May, 1983.

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No. 82-827

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MINNESOTA, PETITIONER

v.

MARSHALL DONALD MURPHY

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the Fifth Amendment prohibits the use in a criminal prosecution of incriminating statements made by the defendant to his probation officer during the course of non-custodial questioning, because the probation officer did not first warn the defendant of his right not to incriminate himself.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-827

STATE OF MINNESOTA, PETITIONER

v.

MARSHALL DONALD MURPHY

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

The issue in this case is whether statements made by a probationer to his probation officer during non-custodial questioning may be used in a criminal prosecution of the probationer, when the officer did not warn the probationer of his privilege against self-incrimination before questioning him. The resolution of the question whether such a warning is required will significantly affect the relationship between federal probation officers and the probationers and parolees they supervise. The Court's analysis of the issues presented by this case may also affect the ability of federal law enforcement officers to question suspects in many other contexts.

STATEMENT

1. In 1980, respondent was charged with criminal sexual conduct and pled guilty to the lesser included offense of false imprisonment. He was sentenced to 15 months' imprisonment, but the execution of that sentence was suspended and he was placed on probation for three years. Pet. App. A2, B2-B3.

The terms of respondent's probation required him, among other things, to report to his probation officer "as directed"; to attend a treatment program for sex offenders; to obey the law; and to "[b]e truthful to your Probation Officer in all matters." Pet. App. C32; see *id.* at A2, B3. Except for the provision concerning the treatment program, all of these are standard conditions of probation. *Id.* at B3, C4. A probationer who violates any condition may have his probation revoked and his sentence executed. *Id.* at C32.

In October 1980, respondent began a series of regular monthly meetings with probation officer Widseth. These meetings were held in Widseth's office. Pet. App. A2, C4-C5. The understanding between Widseth and respondent was that respondent would call her each month to schedule an appointment, and respondent did so, "on his own initiative" (*id.* at C13). Widseth described these meetings as follows: "We would discuss any changes that had occurred in his situation, his life situation, since I had last met with him, [and] his progress [in the treatment program] * * *. He discussed his employment quite often, many problems that arose with that, or with personal relationships." *Id.* at C6. At the same time, respondent was attending the treatment program at an institution called Alpha House. *Id.* at C4-C5.

In July 1981, Alpha House informed Widseth that respondent had stopped participating in the program. Widseth then wrote to respondent, saying: "In view of your recent Alpha House attendance difficulties, I am requesting that you contact me immediately. Failure to do so will result in an immediate request for a warrant." Pet. App. A2, B3, C7, C35. This was the first occasion on which Widseth had written a letter asking respondent to contact her. *Id.* at C14.

Respondent scheduled a meeting for one week later, and he and Widseth discussed his failure to participate in the program. After hearing respondent's explanation, Widseth decided that because respondent was doing well in other respects, she would not require him to continue

attending the treatment program. Pet. App. B3, C8, C14. Widseth had the authority, however, to require respondent to resume treatment. *Id.* at B3.

Respondent's next regular appointment with Widseth, on September 11, was again scheduled at respondent's instance. Pet. App. B4, C14. After this meeting, respondent "was under no obligation to arrange another meeting with his probation officer until mid-October" (*id.* at B4). But on September 22, an Alpha House counselor told Widseth that during the treatment program respondent said that he had once committed a rape-murder for which he was not charged. Without contacting the police, Widseth wrote to respondent: "To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment." *Id.* at A3, B4, C20, C36.

Respondent contacted Widseth and met her in her office on September 28. At that meeting, Widseth told respondent what she had learned from Alpha House and said that she now thought respondent would need further treatment. Pet. App. A3, B4. Widseth testified, and respondent confirmed her account, that she "expressed concerns to [respondent] that with the new information that I had received that his actions in the false imprisonment case and actions in the rape and murder that he had admitted to were strongly related behaviorally and that that needed to be dealt with [by] continued treatment." *Id.* at C9; see *id.* at C27.

Respondent reacted to Widseth's revelation of what she had learned from Alpha House by becoming "angry because he thought that everything he said in treatment was confidential." Pet. App. B5. Respondent "stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney." *Id.* at A3. Widseth replied that respondent "would have to deal with" calling an attorney "outside of the office" (*id.* at C16) because her concern was the relationship between

the two offenses and respondent's need for further treatment. *Id.* at A3-A4, C16-C17.

Respondent's reaction to Widseth's emphasis on the relationship between the two offenses was to deny that he was guilty of the false imprisonment. Widseth confronted respondent with the evidence of his guilt of that offense. At some point, respondent began to discuss the rape-murder, explaining that it was unrelated to the false imprisonment because it was caused by a habit of using drugs that he had since broken. In the course of explaining the rape-murder, respondent described it in detail. Pet. App. A4, B5, C10-C11, C17-C18. Widseth testified that although respondent was calm during most of the conversation, he began crying toward the end and said that "he felt he had committed the ultimate sin" (*id.* at C11). Widseth also testified that the door to her office was open throughout the conversation and that respondent had been free to leave; respondent testified that he believed that if he had left the office he would have violated the conditions of his probation. *Id.* at C19-C20, C26.

At the end of the conversation, Widseth told respondent that she was obligated to report what she had learned to the police. Pet. App. B5. Respondent replied that he understood that this was her obligation and "that he thought [Widseth] must really care about him to have him come in and talk about this because [she] could have just picked up the phone and started dialing the police" (*id.* at C19, C21). But respondent also remarked that the only evidence against him "would just be [Widseth's] word" unless he confessed to the police (*id.* at C22). Widseth allowed respondent to leave her office, although she encouraged him to turn himself in to the authorities. A warrant was issued for his arrest several days later. *Id.* at A4-A5, C18-C19.

2. Respondent was indicted for first degree murder, and he moved to suppress the statements he had made to Widseth. After a hearing the trial court denied the motion. Pet. App. B2, B15, B17. It first ruled that because "the setting of the interview was not custodial" (*id.* at

B6), the fact that no *Miranda* warnings were given did not require the suppression of respondent's statements. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In reaching this conclusion, the trial court relied on *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), and noted that while respondent was required to meet with Widseth periodically, "[h]e * * * was responsible for setting up the time" and "[t]he office was a place where he had been at least twelve times during the previous year." Pet. App. B11. Moreover, the court noted, respondent "came in on his own [and] he left on his own." *Ibid.*

The trial court also held that respondent's statements were voluntary. In this connection, the court found that respondent's reference to calling an attorney related only to his concern about Alpha House's supposed breach of confidentiality; the court specifically found that respondent "did not express th[e] desire [for an attorney] in any context other than a civil suit for the breach of confidentiality." Pet. App. B13-B14. The court also noted several factors suggesting that respondent's statements were voluntary. Widseth was familiar to him, as was the setting; he had chosen the time for the appointment; he was "29 years old, a high school graduate, * * * [with no] mental deficiencies"; and he "had been previously convicted of other felonies and was familiar with the criminal justice system." *Id.* at B13. Moreover, when Widseth opened the interview by relating to respondent the information she had learned from Alpha House, respondent "was angry" but only "at his confidences being disclosed," and he "talked with [Widseth] freely." *Ibid.*[1]

3. A divided Minnesota Supreme Court reversed, finding that although the questioning of respondent was not custodial interrogation, the conditions of his probation generated sufficient legal and psychological pressure to respond to Widseth's questions that in the absence of ap-

[1] The district court also held that the testimony of Alpha House counselors was inadmissible under both the regulations governing federally assisted treatment programs and, "it appears[,]" state law. Pet. App. B15-B16. This issue is not before this Court.

propriate warnings, respondent's statements should be considered to have been compelled.

SUMMARY OF ARGUMENT

A. The Self-Incrimination Clause, on which the decision below rests, applies only to *compelled* statements. The court apparently believed that respondent's statements were compelled by "psychological pressure" (Pet. App. A8), but the Fifth Amendment does not preclude the use of every statement resulting from some degree of psychological pressure. The Minnesota Supreme Court did not hold, and could not have held, that respondent was compelled to make incriminating statements to Widseth in the traditional sense that his will was overborne. Moreover, it correctly recognized that because respondent was not in custody, the prophylactic rule of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), did not apply to his statements.

Instead, the court apparently concluded that three circumstances combined to compel respondent to speak: his probation conditions placed him under some obligation to meet Widseth; they required him to be truthful with Widseth; and Widseth was questioning him about suspected criminal activity. But these circumstances, separately or together, do not create a compulsion to speak.

The obligation to meet periodically with a probation officer is in no way comparable to the kind of custodial pressures that can (as the Court held in *Miranda*) compel a person to speak. Unlike a person who is arrested, respondent was not placed under sudden physical restraint at a time and place chosen by an officer; he responded to a letter by making an appointment at his convenience. Moreover, respondent was not "thrust into an unfamiliar atmosphere * * * created to subjugate the individual to the will of his examiner" (*Miranda*, 384 U.S. at 457); he had met with Widseth in her office a dozen times. Respondent also was never under physical restraint. The most he asserted is that he be-

lieved he would violate his probation conditions if he left Widseth's office, and it is far from clear that even this belief was well founded, especially when respondent did not even ask Widseth if he could leave.

The probation condition requiring respondent to be truthful with Widseth did not on its face require him to answer any questions. Presumably respondent was under a general duty to cooperate with Widseth so that she could effectively supervise his probation, but such a general duty would not compel him to answer any particular question or line of questions, at least until Widseth informed him that he was being uncooperative in a way that violated the conditions of his probation. Moreover, respondent was free to seek clarification if he was in doubt about the extent to which his probation conditions required him to respond to Widseth's questions, but he did not do so. Had respondent refused to speak to Widseth about the rape-murder and subsequently been subject to probation revocation for such a refusal, there might be a colorable basis to his self-incrimination claim, but there is none in this context.

Even if respondent's probation conditions are understood to require him to answer each of Widseth's questions, respondent still had the opportunity to invoke the privilege against self-incrimination. This Court has repeatedly held that a person to whom questions are posed by the authorities ordinarily must invoke the privilege, instead of answering, or his answers will not be considered to have been compelled. Respondent could at least have attempted to assert the privilege to Widseth without any risk whatever.

This Court's decisions plainly preclude the Minnesota Supreme Court's suggestion that Widseth placed respondent under compulsion by revealing, with her questions, that she suspected him of a crime. *E.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976). Nor is it significant that respondent may have had a relationship of trust and con-

fidence with Widseth. Respondent's statements unquestionably would not have been compelled if they had been made to an informer in whom he had absolute trust, and who he believed had no connection with the authorities; by contrast, respondent knew that Widseth was a law enforcement officer, and he had no reason to assume that she would not disclose to the police any information he gave her.

B. Even if it were concluded that the three circumstances identified by the Minnesota Supreme Court constituted the kind of pressure that would render statements compelled in other contexts, the special circumstances of the probation context dictate a different result. When a person has been convicted of a crime, his constitutional rights can be limited to the extent reasonably necessary to accommodate the government's penal and rehabilitative interests. The three circumstances that were held to create a compulsion to speak are indispensable to a workable probation system.

Probation cannot operate effectively unless the probationer can be required to report to his supervising officer and cooperate to the degree necessary to permit adequate supervision.. Moreover, the probation officer must be free to inquire into whether the probationer has committed another crime. Frequently, for example, the probation officer will receive information suggesting that the probationer has committed, or is planning, another crime during the probation period; the officer would be derelict in his duty if he did not investigate further to determine whether the probation had failed.

Requiring probation officers to give a warning before asking about possible criminal activity would significantly interfere with the probation relationship. It would go far beyond dispelling any coercion; it would put probationers on their guard, make those inclined to cooperate with their probation officers less willing to do so, and disrupt a relationship that is central to the rehabilitative process.

ARGUMENT

THE SELF-INCRIMINATION CLAUSE DOES NOT PROHIBIT THE STATE FROM USING RESPONDENT'S STATEMENTS AGAINST HIM IN A CRIMINAL PROSECUTION

A. Respondent Was Not Compelled to Answer His Probation Officer's Questions

1. Preliminarily, we note that the Minnesota Supreme Court cast its ruling in part in terms of due process (Pet. App. A10). It seems clear, however, that the court's reference to due process adds nothing to its ruling under the Self-Incrimination Clause. See *United States* v. *Washington*, 431 U.S. 181, 190 n.6 (1977). The conclusion to the majority's opinion (Pet. App. A11) makes it entirely clear that the court did not find Widseth's actions to be fundamentally unfair or shocking to its conscience.[2] Rather, the court observed that its invocation of due process was merely a way of "[s]tat[ing] differently" its conclusion that the prohibition against compelled self-incrimination barred the use of respondent's statements (*id.* at A10). The court did not suggest that the warning it required would serve any purpose other than to prevent a person from unwittingly incriminating himself, and the Due Process Clause provides no greater pro-

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[2] In particular, the court's opinion does not suggest that Widseth unfairly tricked respondent into believing that she would not report his statements to the police. Respondent testified (although neither court below found) that he did not expect Widseth to report his statements to the police (Pet. App. C27-C28, C30), but he did not testify that she made any representation, implicit or explicit, to this effect, and neither court below suggested that respondent had any basis for believing that his conversations with Widseth were confidential. See also *Fare* v. *Michael C.*, 442 U.S. 707, 722 (1979).

In any event, if the Minnesota Supreme Court was concerned that respondent mistakenly believed his conversations with Widseth were confidential, the proper course would have been to require a disclaimer of confidentiality, not a warning of the privilege against self-incrimination.

tection against compelled self-accusation than the Self-Incrimination Clause. See *Michigan* v. *Tucker*, 417 U.S. 433, 442 (1974); *Miranda* v. *Arizona*, 384 U.S. 436, 511-512 & n.8 (1966) (Harlan, J., dissenting).

2. The Self-Incrimination Clause prohibits the use of *compelled* statements. "The Amendment speaks of compulsion. It does not preclude a witness from [making statements] voluntarily in matters which may incriminate him." *United States* v. *Monia*, 317 U.S. 424, 427 (1943). "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Washington*, 431 U.S. at 187. See also *Miranda*, 384 U.S. at 478. The Minnesota Supreme Court appears to have concluded that "psychological pressure" (Pet. App. A8) compelled respondent to speak, but "pressure" and "compulsion" cannot be automatically equated in constitutional analysis.

a. The Fifth Amendment's prohibition of compelled self-incrimination cannot, of course, be read to extend to all official actions that cause a person to feel under some pressure to speak.[3] "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." *Washington*, 431 U.S. at 187. The mere fact that a question was asked by a law enforcement officer will cause most people to feel some degree of what might be characterized as psychological pressure to give an answer. See *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973). But it is entirely clear that the police may generally engage in non-custodial questioning of suspects without giving warnings, and that the answers they obtain are admissible. See *Washington*, 431 U.S. at 187-188 (law enforce-

[3] Although it is not entirely clear from the testimony given at the suppression hearing (see Pet. App. C8-C11, C17-C18, C26-C27) that respondent's incriminating statements were the result of Widseth's interrogation (see generally *Rhode Island* v. *Innis*, 446 U.S. 291 (1980)), both courts below assumed that they were, and we do also.

ment officials do not compel a statement if they create "an atmosphere conducive to truthtelling" in which a person "is more likely to tell the truth"); *Mathiason*, 429 U.S. at 495 ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question."); *Beckwith* v. *United States*, 425 U.S. 341 (1976); *Miranda*, 384 U.S. at 477-478.

Moreover, a variety of emotional or psychological needs may impel a person to admit that he has done wrong or to discuss acts that he believes to have been wrong. This is a common reason for making incriminating statements; a confession that is not the product of a calm calculation of self-interest is likely to be the result of such emotional or psychological impulses.[4] While difficult issues might arise if a law enforcement officer preyed on a suspect's particular psychological weakness, a statement is not compelled merely because an official's show of authority, together with his questions, triggered the emotional impulse to speak; otherwise, the products of obviously non-coercive police questioning would be excluded from evidence. Similarly, if a suspect is subconsciously seeking a sympathetic audience, there is no meaningful sense in which an official "compels" him to speak by merely asking questions in an unintimi-

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[4] When a suspect makes incriminating statements because he has calculated that he will receive more favorable treatment from the authorities if he cooperates than if he falsely maintains his innocence, his statements may be said to result from "psychological pressure" of an even more direct sort—the belief that he will be worse off if he does not cooperate. Nonetheless, a statement made for this reason is plainly not inadmissible under the Self-Incrimination Clause. See *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975). Moreover, the authorities may point out to a suspect that he is likely to be treated more favorably if he cooperates, as long as they do not make direct threats or coerce the suspect. See *Fare* v. *Michael C.*, 442 U.S. 707, 727 (1979).

dating way and assuring the suspect—perhaps truthfully—that he has some understanding of the suspect's plight and that the suspect may obtain some emotional satisfaction by speaking freely.[5] In such a situation, it is still "an independent decision on his part [that] cause[s] the defendant to speak" (*Miranda*, 384 U.S. at 465).

b. The test for determining if a statement has been compelled is thus not whether it is in some sense the product of psychological pressure, but "whether, considering the totality of the circumstances, the free will of the [speaker] was overborne." *Washington*, 431 U.S. at 188, citing *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). But the Minnesota Supreme Court did not suggest that respondent's statements were compelled in this sense; respondent's interview with Widseth was not remotely comparable to the prolonged, coercive interrogations of vulnerable suspects that this Court has found to create a compulsion to speak.[6]

In *Miranda*, the Court held that statements that were not compelled in this sense would nonetheless be inadmissible if they were obtained by "custodial interroga-

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[5] Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-488 (1971) ("[T]he simple but often powerful convention of openness and honesty [and] the fear that secretive behavior will intensify suspicion" are among the "forces pushing [a person] to cooperate with the police.").

[6] See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978) ("The statements at issue were * * * the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness."); *Sims* v. *Georgia*, 389 U.S. 404, 407 (1967) (suspect "had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. * * * He is an illiterate, with only a third grade education, whose mental capacity is decidedly limited"); *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963) (suspect "was encircled in her apartment by three police officers and a twice convicted felon," and "the police * * * told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate' ").

tion" of a defendant who had not been warned of his right to remain silent and his right to have an attorney present. 384 U.S. at 444. The Court reasoned that a custodial setting "carries its own badge of intimidation" (*id.* at 457) because "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to [manipulative and intimidating] techniques of persuasion * * * cannot be otherwise than under compulsion to speak" (*id.* at 461). The Court accordingly determined that "without proper safeguards the process of in-custody interrogation * * * contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (*id.* at 467).

But the Minnesota Supreme Court did not hold, and could not have held, that *Miranda* itself required the suppression of respondent's statements to Widseth. *Miranda* applies only to "a defendant questioned while in custody or otherwise deprived of his freedom of action in a[] significant way." 384 U.S. at 445. *Miranda* warnings are needed "to dispel the compulsion inherent in *custodial* surroundings" (*id.* at 458; emphasis added). The trial court ruled that "the setting of the interview" between respondent and Widseth "was not custodial" (Pet. App. B6), and the Minnesota Supreme Court agreed that respondent "was not in custody in the usual sense" (*id.* at A9).

In *Oregon* v. *Mathiason*, this Court held that a parolee under supervision, who reported to a police station in response to a police officer's request and was told that he was not under arrest, was not in custody within the meaning of *Miranda*. See 429 U.S. at 495 ("*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."). Respondent's situation was not materially different from that of the parolee in *Ma-*

thiason; respondent came by himself in response to a request from Widseth, and he clearly was not placed under arrest at any point. Indeed, the conversation between Widseth and respondent—Widseth's urging respondent to turn himself in, and respondent's thanking Widseth for not notifying the police at once—demonstrates that it was well understood that respondent was not under arrest.

3. Even though respondent's will was not overborne and he was not placed in a custodial setting that required *Miranda* warnings, the Minnesota Supreme Court determined that the psychological pressures to which respondent was exposed constituted sufficient compulsion to render respondent's statements inadmissible. The court apparently believed that three circumstances created this compulsion (see Pet. App. A10): respondent's probation conditions placed him under some obligation to meet with his probation officer; respondent's probation was conditioned on his being truthful with the probation officer; and the officer was questioning him about possible criminal activity.[7]

While there were, of course, certain compulsory aspects of respondent's relationship with Widseth, the Minnesota Supreme Court failed to explain why these features created an unacceptable "compulsion to *speak*" (*Miranda*, 384 U.S. at 461; emphasis added). None of the decisions it cited supports its holding,[8] which is

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[7] Apparently, Widseth asked respondent about the rape-murder because of information, learned from Alpha House, that the trial court held inadmissible. But nothing in the opinion of the Minnesota Supreme Court suggests that its holding was influenced by this circumstance. Consequently, for present purposes, this case must be viewed as if Widseth asked respondent about the rape-murder because she had acquired admissible information from a source to which she was entitled to access, or from her own investigations.

[8] The court principally relied (see Pet. App. A8) on *United States v. Steele*, 419 F. Supp. 1385 (W.D. Pa. 1976). Although *Steele* suppressed a statement made to a probation officer who had not warned the probationer, it squarely held, as a necessary premise of its decision, that "[t]here is no question * * * that defendant was in

flatly inconsistent with the decisions of several federal courts.[9] We submit that there is no basis for concluding that the three circumstances mentioned by the court gave rise to compulsion within the meaning of the Self-Incrimination Clause.

a. In concluding that "the compulsory nature of the meeting" between respondent and Widseth contributed to the compulsion to speak, the Minnesota Supreme Court,

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cus'ody at the time he was questioned by the probation officer." *Id.* at 1386. Indeed, the court appears to have ruled, in dictum, that "a probationer is not entitled to Miranda warnings when questioned on a visit to his probation officer." *Ibid.* See also *United States* v. *Deaton*, 468 F.2d 541, 544 (5th Cir. 1972) (parolee "was in custody" when interrogated); *People* v. *Diesing*, 67 Ill. App. 3d 109, 384 N.E.2d 575 (1978) (probationer was confined in county jail when interrogated); *State ex rel. Struzik* v. *Department of Health & Social Services*, 77 Wis. 2d 216, 252 N.W.2d 660 (1977) (parolee was confined in jail); *People* v. *Hardenbrook*, 68 Mich. App. 640, 243 N.W.2d 705 (1976) (holding *Miranda* inapplicable to probation revocation proceedings; not addressing question whether *Miranda* warnings would be required if state sought to use evidence in a criminal prosecution); *State* v. *Magby*, 113 Ariz. 345, 348-349, 554 P.2d 1272, 1275-1276 (1976) ("in-custody statements * * * to a probation officer"); *State* v. *Roberts*, 14 Wash. App. 727, 544 P.2d 754 (1976) (statements made by probationer who was not in custody are admissible even though not preceded by *Miranda* warnings); *State* v. *Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), remanded, 425 U.S. 257, on remand, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976) (*Miranda* warnings required under state law when parolee is questioned in jail); *State* v. *Williams*, 486 S.W.2d 468, 473-474 (Mo. 1972) (*Miranda* warnings must be given if a parolee "has been arrested and taken into actual police custody"); *State* v. *Lekas*, 201 Kan. 579, 583, 442 P.2d 11, 15 (1968) (parolee "was taken into custody").

[9] See, *e.g.*, *United States* v. *Holmes*, 594 F.2d 1167, 1171 (8th Cir.), cert. denied, 444 U.S. 873 (1979) (contention that probationer is entitled to *Miranda* warnings before non-custodial interview with probation officer is "insubstantial"); *United States* v. *Delago*, 397 F. Supp. 708, 712 (S.D.N.Y. 1974). See also *United States* v. *Rea*, 678 F.2d 382, 390 (2d Cir. 1982); *United States* v. *Miller*, 643 F.2d 713, 715 (10th Cir. 1981) (*Miranda* warnings not required before interview with probation officer at probationer's home).

while acknowledging that respondent was not in custody within the meaning of *Miranda*, relied on *Miranda* by analogy. See Pet. App. A8-A10. *Miranda*, of course, did not hold that even custodial interrogation invariably compels a suspect to speak; *Miranda* only specified "prophylactic standards" designed "to safeguard [the] privilege" against self-incrimination in a custodial setting. *Michigan* v. *Tucker*, *supra*, 417 U.S. at 446. More important, however, this case presents none of the characteristics of custodial interrogation that the *Miranda* Court found inherently likely to create a compulsion to speak.

For example, the court below stated that respondent met with Widseth "under legal compulsion" because "it had been made clear to him in the past that it was a condition of his probation that he meet with the agent when requested." Pet. App. A10. But there is a great difference between the diffuse compulsion to meet regularly with a probation officer and the intense custodial presence that, *Miranda* found, was likely to intimidate a person into speaking when he would rather remain silent.

Respondent was not "swept from familiar surroundings into police custody" by a forcible arrest (*Miranda*, *supra*, 384 U.S. at 461); he made an appointment at a mutually convenient time, and there is no reason to doubt that Widseth would have permitted him to reschedule the appointment if he had a legitimate reason for doing so. By contrast, a suspect who is arrested is often physically forced to submit to an officer at the time and place chosen by the officer, without any opportunity for prior consultation with counsel or friends, and thereafter remains under the officer's control; for this reason, the *Miranda* Court was concerned that an arrest may convey to the suspect the message that he has no choice but to submit to the officer's will in other respects as well. See, *e.g.*, 384 U.S. at 456-457. Respondent was subjected to no such compulsion; while he presumably knew that he was expected to answer Widseth's letter,

the psychological impact of the letter on respondent obviously cannot be compared to the effect of an arrest in its tendency to cause an individual to believe that he has no choice but to submit to the officer.[10] Indeed, respondent was subject to less intimidating pressure than a person subpoenaed to testify, about whom this Court has explained (*United States* v. *Dionisio*, 410 U.S. 1, 10 (1973), quoting *United States* v. *Doe*, 457 F.2d 895, 898 (2d Cir. 1972)):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" * * *:
>
> > "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court."

Moreover, the routine nature of respondent's meetings with Widseth sharply distinguishes them from the encounters that *Miranda* determined to be inherently coercive. Respondent was not "thrust into an unfamiliar atmosphere" or "an interrogation environment * * * created for no purpose other than to subjugate the individual to the will of his examiner" (*Miranda*, 384 U.S. at 457). As the district court noted, both the surroundings and Widseth herself were very familiar to respondent; he had met with her in her office a dozen times. An individual in a familiar environment, dealing with a

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[10] Moreover, the meeting at which respondent made his inculpatory statements was, if anything, even less obligatory than respondent's other meetings with Widseth. It was not a regularly scheduled monthly meeting of the sort that respondent knew he had to arrange; Widseth only "request[ed]" that respondent contact her and, in contrast to her previous letter, did not threaten respondent with arrest if he did not do so.

person he knows, is far less subject to psychological intimidation. The Court recognized this fact in *Miranda*, where it stressed the ability of police officers to take advantage of a suspect's unfamiliarity with both them and the environment. See, *e.g.*, 384 U.S. at 450, 457, 496. Many of the psychological ploys discussed in *Miranda* capitalize on this unfamiliarity and would simply have been unavailable to Widseth. See *id.* at 452.

Finally, the coercive pressures with which *Miranda* is concerned derive in large measure from "an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained" (384 U.S. at 468; see, *e.g.*, *id.* at 451). But respondent concededly was not under physical restraint or unable to leave Widseth's office. The most that respondent averred—in testimony at the suppression hearing—was that he thought he would be declared in violation of his probation if he left. See Pet. App. C26. A similar claim of "compulsion" could have been made if respondent and Widseth had been speaking on the telephone. The effect of such "compulsion" is not comparable to the intimidating pressure on a suspect who knows that he literally cannot escape an insistent interrogator.[11]

b. It was also error to conclude that respondent's statement was compelled by the probation condition that required him to be truthful with his probation officer. On its face, that probation condition simply required respondent not to make false statements to Widseth and said nothing about his freedom to decline to answer.

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[11] In any event, neither court below specifically found that respondent remained in Widseth's office because he believed he would be declared in violation of his probation if he left. It is far from certain that respondent had such a belief; as we noted, the meeting was scheduled at a time agreeable to respondent and was in response to a request unaccompanied by any threat, and Widseth had been far from inflexible in her prior dealings with respondent. Had respondent been in doubt about whether he could leave without violating a condition of his probation, he could have asked Widseth.

Citizens are often required to be truthful in their dealings with the government; any person commits a crime if, for example, he makes a false statement to a federal law enforcement officer in connection with a matter within the officer's jurisdiction. 18 U.S.C. 1001.

i. We will assume, however, that respondent, like most probationers, was required to cooperate with Widseth to the extent necessary to permit adequate supervision. That is, respondent presumably was not free to refuse to answer Widseth's questions altogether. But it does not follow that respondent was compelled to answer every particular question. It is not clear that his general duty to cooperate precluded him from declining on occasion to discuss certain matters—because he considered them too private, for example—as long as he did not unduly obstruct efforts to supervise his probation. Consequently, at least until Widseth gave respondent some reason to believe that he was being uncooperative in a way that violated the conditions of his probation, any requirement that he be generally cooperative could not have *compelled* him to discuss a particular subject.

In any event, if respondent was in doubt about the contours of his duty to cooperate with Widseth, or the meaning of the probation condition that required him to be truthful, he was free to seek clarification. Even though he knew from the time he accepted probation that he had incriminating secrets in which Widseth would be interested, we know of no indication that he ever asked her or the sentencing court for clarification of his duty, if any, to disclose such information.

To be sure, the existence of a general duty to cooperate may have affected respondent's attitude toward Widseth's questions, his overall willingness to be forthright with her, and the atmosphere of their encounters. But such influences are comparable to the "atmosphere conducive to truthtelling" (*Washington*, 431 U.S. at 187) that surrounds many official proceedings, or the "coercive aspects" of every interview with a police officer (*Mathiason*, 429 U.S. at 495). As we explained above, such influences do not constitute compulsion to speak.

ii. Even if respondent's probation conditions are construed as having required him to answer *all* of Widseth's questions, respondent still had the opportunity to assert the privilege against self-incrimination if he wished not to give an incriminating answer. The pressure involved would have been no greater than that on a witness subpoenaed to testify or a taxpayer under a legal obligation to file a federal income tax return. It is well established that if such a witness or taxpayer makes a statement, instead of claiming the privilege against self-incrimination, the statement may be used against him in a criminal prosecution. See, *e.g.*, *Garner* v. *United States*, 424 U.S. 64Ɛ (1976); *United States* v. *Kordel*, 397 U.S. 1 (1970); *Rogers* v. *United States*, 340 U.S. 367, 370-371 (1951); *Monia*, 317 U.S. at 427; *United States* v. *Murdock*, 284 U.S. 141, 148 (1931); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 112-113 (1927). See also *Maness* v. *Meyers*, 419 U.S. 449, 466 (1975) (The privilege against self-incrimination "is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.").[12]

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[12] The court below correctly noted (Pet. App. A5-A6) that the rule is not the same for *custodial* interrogations. As this Court has explained (see *Garner*, 424 U.S. at 657-658; *Roberts* v. *United States*, 445 U.S. 552, 560 n.6 (1980)), that is because the pressures *Miranda* determined to be inherent in custodial surroundings are pressures not just to answer questions but to refrain from asserting the privilege; pressures that tend to overbear a person's will not to answer also overbear his will to assert the privilege. "It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent. * * * Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures." *Garner*, 424 U.S. at 657.

But as we have explained, respondent was not in custody or in any condition comparable to custody when Widseth interviewed him, and the setting of that interview did not create pressures tending to overbear respondent's will. "Although *Miranda*'s requirement of specific warnings creates a limited exception to the rule

The reason for this principle is that a person who is required to answer a question may nevertheless choose to answer for reasons of his own and not because he is compelled within the meaning of the Fifth Amendment; unless he asserts the privilege, there is ordinarily no basis for concluding that he has not made such a voluntary choice.

> [I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not "compelled" him to incriminate himself. "[If a declarant] * * * desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Garner, 424 U.S. at 654-655, quoting *Monia*, 317 U.S. at 427 (footnote omitted).

Respondent could have attempted to assert the privilege —to Widseth, at least—without risk; nothing in respondent's testimony suggests that he believed or had reason to believe that his probation would have been revoked for merely asking Widseth if he could decline to answer her questions because he might incriminate himself. For this reason, respondent's situation was in no way comparable to that of the witnesses in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), who knew that they would suffer substantial penalties if they invoked the privilege. See also *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). Had Widseth informed respondent that asserting the privilege would be a violation of the conditions of his probation, a more difficult question would arise whether respondent would have had to persist and test his right to assert the privilege in probation revocation proceedings. See *Garner*, 424 U.S. at 661-665. See also pages 29-30 note 18, *infra*. In the circumstances presented by this case, however, there

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that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts*, 445 U.S. at 560.

is no reason to attribute respondent's willingness to discuss the rape-murder to compulsion arising from his probation conditions; the more plausible explanation is that respondent chose to discuss it for other reasons, and that any role played by pressures arising from his probation status did not amount to constitutionally proscribed compulsion.[13]

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[13] The trial court found that respondent's comment that he thought he should contact an attorney related only to what respondent considered to be Alpha House's breach of confidentiality, not to Widseth's questioning. The Minnesota Supreme Court did not question this finding, or suggest that respondent invoked the privilege against self-incrimination when he made this comment. Moreover, that court's holding in no way depended on a determination that respondent requested an attorney or otherwise invoked the privilege.

The Minnesota Supreme Court appears to have interperted certain statements in *Garner*, 424 U.S. at 657, 660, and *Roberts*, 445 U.S. at 559, to suggest that because Widseth "had substantial reason to believe that [respondent's] answers were likely to be incriminating" (Pet. App. A10; see *id.* at A6), respondent did not have to invoke the privilege in response to her questions but could answer and later seek to suppress the statements. This reasoning is flawed in several respects.

First, the Self-Incrimination Clause cannot under any circumstances require the suppression of respondent's statements unless those statements were compelled. Even those members of the Court who have suggested that a witness sometimes need not invoke the privilege in response to a question that clearly seeks incriminating information advocate such an approach only if an answer to the question is by some means compelled. See, *e.g.*, *United States* v. *Mandujano*, 425 U.S. 564, 591-594, 596-600 (1976) (Brennan, J., concurring). As we explained in the text, unless respondent's probation conditions are somewhat unnaturally interpreted to require him to answer each of Widseth's questions, he was not under compulsion from any source to speak about the rape-murder. See *Washington*, 431 U.S. at 190 ("[T]he distinction between compulsion to incriminate and compulsion to disclose what the Government is entitled to know is of no help to respondent; in this case there was no compulsion to do either.").

Even when a person is under compulsion to answer the government's questions, it should not be material that the government knows it is seeking incriminating information unless the person is silent, and the government seeks to penalize his silence. If a

Respondent also cannot contend that a warning was required to ensure that he was not ignorant of his right not to incriminate himself. This Court has never held that such a warning is needed before non-custodial questioning, even in cases where a defendant is far more likely than respondent to be unaware of his rights. See *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 226-227 (citing cases). *Miranda* itself envisioned that police officers would question persons not in custody without giving warnings (384 U.S. at 447-448), and the *Miranda* Court could scarcely have assumed that all of those so interrogated would be more familiar with their constitutional rights than respondent. Even when a person is compelled to answer questions—as in the case of a witness under subpoena—the Court does "not apply a

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compulsory question does not obviously seek incriminating information (as in the case of a federal income tax return), silence may be either an invocation of the privilege or a simple evasion of the duty to answer, and the government is entitled to treat it as the latter unless it is clearly identified from the outset as the former. See *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927). See also *Roberts*, *supra*. But when a question obviously seeks incriminating information, there is far more reason to treat silence as an invocation of the privilege and "therefore forg[i]ve the usual requirement that the claim of privilege be presented" (*Garner*, 424 U.S. at 659 n.11). The Court forgave the requirement for this reason in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the gambling tax cases discussed in the portion of *Garner* on which the Minnesota Supreme Court relied.

Here, of course, the State did not seek to penalize respondent for silence, but to use statements he made. In this situation, as we explained in the text, the rationale for the rule that the privilege must be asserted when the statement is sought is that otherwise the statement cannot be considered compelled. This rationale is equally strong whether or not the government knows that the answer to its question will probably be incriminating. If, as the Court has said (*Garner*, 424 U.S. at 654-655, quoted at page 21, *supra*), a person's failure to invoke the privilege in response to a question means that the answer cannot be treated as compelled, it has this meaning no matter what the state of the government's knowledge.

'waiver' standard as that term was used in *Johnson* v. *Zerbst*, 304 U.S. 458[, 464] (1938) ["an intentional relinquishment * * * of a known right"], and * * * an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." *Garner*, 424 U.S. at 654 n.9. The Court has, in short, always assumed that individuals have a sufficient familiarity with the principle that they are not obligated to incriminate themselves to the authorities (see *Michigan* v. *Tucker*, *supra*, 417 U.S. at 439 ("virtually every schoolboy is familiar with the concept, if not the language, of the [Self-Incrimination Clause]")), or that, in any event, their ignorance would not transform a non-coercive inquiry into compulsion.

Indeed, respondent has not asserted that he was unaware of his privilege against self-incrimination. His "angry" reaction upon learning that Alpha House had disclosed information to Widseth shows that he was well aware of the advantages of keeping incriminating information from her and felt himself under no obligation to reveal such information to her.[14] At the end of his interview with Widseth, respondent expressly contemplated refusing to confess to the police and calculated the effect of such a refusal on his prospects. See Pet. App. C22. In sum, although the trial court made no finding on this point, it seems reasonable to suppose that once respondent learned of the information Alpha House had given to Widseth, he thought considerable emotional release could be gained by discussing the matter more fully with her. In no sense does this constitute compulsion.[15]

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[14] In fact, respondent appears to have disclaimed ignorance, insisting at the suppression hearing that when Widseth mentioned the rape-murder "little flags went up in my head, and you know, I felt like I needed an attorney at the time." Pet. App. C26. (As we noted (page 22 note 13, *supra*), the district court apparently did not credit respondent's assertion that he requested an attorney for this reason, and the Minnesota Supreme Court did not question that determination.)

[15] The Minnesota Supreme Court placed some reliance (see Pet. App. A9) on *Estelle* v. *Smith*, 451 U.S. 454 (1981), which held that

c. The third circumstance on which the Minnesota Supreme Court relied in concluding that respondent's incriminating statements were the product of compulsion was that Widseth "had substantial reason to believe that [respondent's] answers were likely to be incriminating" (Pet. App. A10). But if the circumstances of respondent's interview with Widseth and the conditions of respondent's probation did not compel respondent to answer the other questions Widseth asked, he did not suddenly become compelled to answer when Widseth asked questions about the rape-murder. This Court's decisions foreclose any contention that an otherwise non-coercive interview becomes coercive solely because the authorities ask questions revealing their suspicions and some of the evidence against the suspect. See *Mathiason*, 429 U.S. at 495 ("Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.").

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a psychiatrist may not, at the sentencing phase of a capital trial, give testimony based on damaging statements the defendant made during a custodial, court-ordered psychiatric examination. But in ruling that *Miranda* warnings would be required before such an examination if its results were to be used against the defendant, the Court repeatedly emphasized the custodial nature of the examination. See 451 U.S. at 467, 468, 469. Although the Court suggested that a non-custodial examination could not be compelled if the results were to be used at the sentencing phase of a capital trial, there is no intimation in the Court's opinion that *warnings* would be required before a non-custodial examination that is otherwise not compulsory (see *id.* at 468).

In addition, there is some possibility that a defendant undergoing a psychiatric examination—especially if, as in *Estelle* v. *Smith*, it purports to be concerned only with his competence to stand trial (see 451 U.S. at 456-457)—will make statements that are apparently unrelated to any crime and that become damaging to the defendant only because the psychiatrist, after analyzing them, shows them to be evidence that the defendant is dangerous. For this reason, a defendant undergoing a psychiatric examination may not appreciate that his statements could possibly be incriminating, and their later use may implicate due process concerns distinct from the privilege against compelled self-incrimination. The same cannot be said about respondent, who of course knew that he was discussing a crime with Widseth.

In *Beckwith* v. *United States*, 425 U.S. 341 (1976), for example, the defendant urged—much as the Minnesota Supreme Court reasoned here—that he was entitled to warnings before an interview in which he was the "focus" of a criminal investigation, because that interview placed him "under 'psychological restraints' which are the functional, and, therefore, the legal, equivalent of custody" (*id.* at 345) with its attendant coercive influences. The Court emphatically rejected that contention, saying that it "goes far beyond the reasons for th[e] holding" in *Miranda* and "would cut this Court's holding in that case completely loose from its own explicitly stated rationale" (425 U.S. at 345). "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning." *Beckwith*, 425 U.S. at 346-347 (citations omitted).

The Minnesota Supreme Court might have been influenced by a belief that respondent's incriminating statements to Widseth were to some degree the product of a relationship of trust and cooperation. While this may be true, it does not follow that respondent's statements were compelled or that the values protected by the Self-Incrimination Clause were otherwise implicated. As we noted earlier, confessions will frequently be the result of emotional or psychological impulses, and a law enforcement officer does not compel a statement when he does no more than give those impulses a chance to operate. Indeed, a relationship of trust, in which respondent found Widseth a sympathetic audience, is more nearly the opposite of the overbearing practices condemned by the Court in *Miranda*. Moreover, a statement to an informant prompted by a mistaken belief that he has no relationship with the authorities and can be trusted not to go to them is, without question, not "compelled" within the meaning of the Fifth Amendment. *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966).

Respondent was well aware that Widseth was a law enforcement officer; even the element of deception involved in an incriminating statement to an informant was, therefore, absent here. See also page 9 note 2, *supra*.

We recognize, of course, the dangers to the probation system that might arise if probationers come to regard their supervising officers as nothing more than investigatory law enforcement agents. But the government—which established the probation system as an alternative to prison and as a means of rehabilitating offenders—has a strong institutional interest in not jeopardizing relationships of trust and confidence between probation officers and probationers. We understand, for example, that supervising officers frequently do not seek to prosecute probationers who admit minor crimes to them.[16] Moreover, one consequence of the Minnesota Supreme Court's approach will be to encourage probation officers, acting out of an abundance of caution, to give unnecessary warnings lest they jeopardize a prosecution for a major offense that should not be overlooked. The giving of such warnings can seriously undermine the probation relationship, by discouraging probationers from viewing probation officers as counselors with whom they can discuss their problems, without any benefit to values protected by the Fifth Amendment.

B. Even if Respondent's Probation Conditions Amounted to the Kind of Pressure that Would Constitute Coercion in Other Circumstances, They do not Give Rise to Impermissible Compulsion Here Because They Are Integral Aspects of the Sentence of Probation that the State Lawfully Imposed

Ordinarily, the government would violate a defendant's Fifth Amendment rights if it obtained statements

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[16] Officials of the Administrative Office of the United States Courts, which supervises federal probation officers, have urged that "probation officers preferably not be called as witnesses to testify to statements made in confidence to them by probationers or parolees." Imlay & Reid, *Looking at the Law*, 40 Fed. Probation Q. 56, 58 (Dec. 1976).

from him by compulsion and used the statements in a criminal prosecution. The Fifth Amendment rights of an "already-convicted probationer" (*Gagnon* v. *Scarpelli*, 411 U.S. 778, 789 n.12 (1973)), however, may be limited in order to achieve the legitimate objectives of the probation system. Consequently, even if it were correct to conclude that respondent's statements were the product of what in other contexts would amount to impermissible compulsion, it would not follow that the use of those statements in this case would violate the Constitution.

1. The Court has repeatedly held that constitutional rights that would otherwise be retained by a person convicted of a crime may be restricted in order to accommodate the needs of the penal system. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 545-546 (1979); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974); *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). While this Court's cases have dealt with prisoners, the principle must apply equally when some other form of treatment, such as probation, is determined to be appropriate: "There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" *Bell* v. *Wolfish*, 441 U.S. at 546, quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974). The courts of appeals, applying this principle, have consistently upheld conditions, reasonably related to the purposes of probation, that dramatically limited the exercise of constitutional rights.[17]

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[17] See *e.g.*, *United States* v. *Grubb*, 636 F.2d 1211 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981) (prohibition on holding union office); *United States* v. *Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) (prohibition on running for office or engaging in political activity); *United States* v. *Albanese*, 554 F.2d 543, 545-547 (2d Cir. 1977) (prohibition on associating with other than law-abiding citizens); *Malone* v. *United States*, 502 F.2d 554, 555 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975) (prohibition on "participat[ing] in any American Irish Republican movement[,] * * * belong[ing] to

2. In this case, any reasonable accommodation would permit the State to retain the features of its probation system that the court below identified as a source of compulsion without having to forgo the use of the probationer's statements in a criminal prosecution. The resulting burden on the probationer's constitutional rights is, at most, slight. The compulsion perceived by the Minnesota Supreme Court is attenuated and diffuse; it derives solely from a non-custodial interview and an ambiguous probation condition. Moreover, as we noted, respondent could have resisted even these weak pressures simply by asserting his privilege against self-incrimination.[18]

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* * * Irish organizations, cultural or otherwise[,] * * * visit[ing] any Irish pubs * * * [and] accept[ing] * * * employment that directly or indirectly associates [probationer] with any Irish organization or movement"); *United States* v. *Smith*, 414 F.2d 630, 636 (5th Cir. 1969), rev'd on other grounds *sub nom. Schacht* v. *United States*, 398 U.S. 58 (1970) (prohibition on certain political associations).

[18] Unlike the situation in cases such as *Lefkowitz* v. *Turley*, *supra*, and *Garrity* v. *New Jersey*, *supra*, a substantial argument can be made that because of the importance of keeping a probation officer apprised of the probationer's activities, the government may revoke probation if the probationer asserts his privilege against self-incrimination. As Judge Frankel explained, allowing a probationer to assert the privilege against self-incrimination in response to his probation officer's legitimate inquiries

> would probably spell the end of probation. Defendants are left at large rather than locked up on the understanding that they will be subjected to supervision and will cooperate in their supervision. As an alternative to an intolerable regime of surveillance approaching the quality of prison, probationers must be, and are, relied upon to supply accounts of their major activities, including their means of earning a living. * * * It is unlikely that Congress would continue to authorize, or that sentencing judges would remain as ready to employ, the alternative of probation if the reporting requirement were held unconstitutional.
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> * * * The requirement to report, to account, is centrally and necessary implied in the probationer's status. It may not be avoided by the claim of a privilege which must be held un-

At the same time, the Minnesota Supreme Court's approach might impose severe—perhaps intolerable—costs on the government's ability to maintain a probation system, at least for more than trivial offenses. The purpose of probation is to supervise offenders while " 'help[ing them] reintegrate into society as constructive individuals as soon as they are able' " (*Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 783, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972)), and the probation officer plays a central role in "supervis[ing the] course of rehabilitation" (*Gagnon*, 411 U.S. at 784). The three circumstances that the court below identified as a source of compulsion are indispensable to this process; legislatures and sentencing judges would surely be unwilling to permit probation in many instances where it is now allowed if probationers could not be required to meet with their probation officers and be truthful with them, and if probation officers could not question them about possible criminal activity.

The reporting requirement is plainly central to the probation relationship. "The duty 'to report' and to answer questions posed by a probation officer is an integral obligation of the probationary status." *United States* v. *Rea*, 678 F.2d 382, 390 (2d Cir. 1982). As this Court has noted, "through the requirement of reporting

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available because it is fundamentally inconsistent with the acquisition and maintenance of the probationary status.

United States v. *Manfredonia*, 341 F. Supp. 790, 794-795 (S.D.N.Y.), aff'd, 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972). See also *United States* v. *Rea*, 678 F.2d 382, 390 (2d Cir. 1982) ("While a probationer is not deprived completely of his Fifth Amendment rights and may assert them, he runs the risk that his refusal to answer will lead to a charge of violation of probation. Any other rule would make a mockery of the supervision aspect of probation.").

But this case does not present the question whether the government may require a probationer to relinquish his privilege against self-incrimination entirely, because respondent never asserted the privilege, and the State never attempted to compel a statement over an assertion of the privilege. Cf. *Roberts*, *supra*.

to the parole officer * * * the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development." *Morrissey*, 408 U.S. at 478 (footnote omitted).

Moreover, it is not unusual for a probation officer to receive information suggesting that a probationer was involved in another crime, or may be contemplating criminal activity. A probation officer would be derelict in discharging both aspects of his "'double duty to the welfare of his clients and to the safety of the general community'" (*Gagnon*, 411 U.S. at 783 (citation omitted)) if, upon receiving such information, he did not promptly ask the probationer about the matter and seek to resolve it. See also *Fare* v. *Michael C.*, 442 U.S. 707, 720-722 (1979). A crime committed during the course of probation is an indication that probation is not succeeding and that some corrective action is needed; the fact that the probationer committed an earlier crime may similarly suggest the need for some additional or modified treatment or punishment. Here, for example, Widseth sought to discuss the rape-murder with respondent because she was reconsidering her decision to excuse him from the treatment program.

Unless the government abandons one of these central aspects of probation, the Minnesota Supreme Court's approach would force it to choose between warning a probationer of his right not to incriminate himself and forgoing the use of his statements in a criminal prosecution. Either course would seriously interfere with the probation system. As this Court recognized in *Miranda* (see 384 U.S. at 468-469), both the purpose and the effect of a warning are to put the person being questioned on his guard. See also *Michigan* v. *Mosley*, 423 U.S. 96, 103-104 (1975). While a warning might dispel whatever coercive pressures are present, its effects go far beyond that; they tend to discourage willing probationers from cooperating. A probationer who is inclined to be

forthright is likely, when he hears a warning, to reconsider whether it is not more advantageous to be silent, evasive, or deceptive. For these reasons, the warning requirement would undermine the probation system by impairing, and perhaps frustrating, the probation officer's important inquiries into possible criminal activity by the probationer.

Nor is it acceptable to require the government to forgo the use of powerful evidence of a probationer's guilt. Such a course interferes not only with the enforcement of the criminal law but with the objectives of probation; if a probationer has committed another crime, another prosecution may be necessary in order to impose the correct punitive or rehabilitative treatment on him.[19]

In sum, we do not believe that respondent was in any sense compelled to make incriminating statements to Widseth. But even if the Minnesota Supreme Court was correct in concluding otherwise, the compulsion was limited in degree and was a necessary incident of the probation system. As part of its rehabilitative efforts for persons convicted of a crime, the State was constitutionally permitted to subject respondent to that system without forgoing the right to use his statements in a criminal prosecution.[20]

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[19] For this reason, it is not sufficient that—as the Minnesota Supreme Court apparently acknowledged (Pet. App. A7-A8), and as seems clear—respondent's statements could have been used in a probation revocation proceeding. Compare *Gagnon*, 411 U.S. at 782, with *United States* v. *Ward*, 448 U.S. 242 (1980). See, *e.g.*, *United States* v. *Johnson*, 455 F.2d 932 (5th Cir.), cert. denied, 409 U.S. 856 (1972).

[20] In addition, respondent was not required to accept probation; he did so voluntarily, as an alternative to a term of imprisonment that the State also had the power to impose. When respondent accepted probation, he was expressly advised of its conditions, and he certainly should have anticipated that his probation officer would question him if she received information suggesting that he had committed another crime. He also had no basis for believing that his answers to those questions would not be disclosed to law enforcement authorities (see page 9 note 2, *supra*).

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

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APRIL 1983

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No. 82-827-CSY
Status: GRANTED

Title: Minnesota, Petitioner
v.
Marshall Donald Murphy

Docketed:
November 12, 1982

Court: Supreme Court of Minnesota

Counsel for petitioner: Lynn, Robert Henry

Counsel for respondent: Wernick, Mark S.

Entry	Date	Note	Proceedings and Orders
1	Nov 12 1982	G	Petition for writ of certiorari filed.
2	Dec 10 1982		Brief of respondent Marshall D. Murphy in opposition filed.
3	Dec 15 1982	X	Reply brief of petitioner State of Minnesota filed.
4	Dec 15 1982		DISTRIBUTED. January 7, 1983
6	Jan 10 1983		REDISTRIBUTED. January 14, 1983
7	Jan 17 1983		Petition GRANTED.
			**********
9	Jan 25 1983		Order extending time to file brief of respondent on the merits until April 16, 1983.
11	Feb 15 1983		Order extending time to file brief of petitioner on the merits until March 17, 1983.
12	Feb 25 1983		Brief amicus curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
13	Mar 1 1983		Order further extending time to file brief of respondent on the merits until April 30, 1983.
14	Mar 11 1983		Order further extending time to file brief of petitioner on the merits until April 13, 1983.
15	Mar 11 1983		Order further extending time to file brief of respondent on the merits until May 28, 1983.
16	Apr 13 1982		Joint appendix filed.
17	Apr 13 1983		Brief of petitioner Minnesota filed.
18	Apr 12 1983		Application for leave to file amicus curiae brief in excess of page limitations, and order granting same by
19	Apr 12 1983		Blackmun, J., Apr. 13, 1983, not to exceed 33 pages.
20	Apr 14 1983		Brief amicus curiae of United States filed.
21	Apr 22 1983		Record filed.
22	Apr 28 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	May 16 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	May 24 1983		Brief amicus curiae of Natl. Assn. of Criminal Defense Laywers filed.
25	Jun 3 1983		Record filed.
26	Jun 3 1983		Certified record received.
27	May 28 1983		Brief of respondent Marshall D. Murphy filed.
28	Jul 8 1983		CIRCULATED.
29	Aug 15 1983		SET FOR ARGUMENT. Wednesday, October 12, 1983. (2nd case)
30	Oct 12 1983		ARGUED.